Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

MICHAEL LEE MARSH II,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Does it violate the Constitution for a state capital-sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 4
I. The Kansas Supreme Court's Decision Conflicts With This Court's Decision in *Walton v. Arizona* 5
II. The Kansas Supreme Court's Decision Resurrects a Lower Court Conflict That *Walton* Had Put to Rest 8
III. The Constitutionality of Kansas' Death Penalty Statute, and Similar Statutes in Other States, Is an Important Issue That Merits This Court's Attention 10
CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases:

Adamson v. Lewis, 955 F.2d 614 (9th Cir. 1992) 8
Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (*en banc*) 5, 7, 8
Blystone v. Pennsylvania, 494 U.S. 299 (1990) 6
Boyde v. California, 494 U.S. 370 (1990) 6
Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994) 6, 8
Hulsey v. Sargent, 868 F.Supp. 1090 (E.D.Ark. 1993) ... 3, 10
People v. Mitchell, 604 N.E.2d 877 (Ill. 1992) 9
People v. Young, 814 P.2d 834 (Colo. 1991) 3, 10
Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1992) 8
Ring v. Arizona, 536 U.S. 584 (2002) 3, 4
Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990) 9
State v. Biegenwald, 524 A.2d 130 (N.J. 1987) 3, 10
State v. Bishop, 622 P.2d 478 (Ariz. 1981) 5
State v. Brewer, 826 P.2d 783 (Ariz. 1992) 8
State v. Clark, 616 P.2d 888 (Ariz. 1980) 5
State v. Djerf, 959 P.2d 1274 (Ariz. 1998) 9
State v. Greenway, 823 P.2d 22 (Ariz. 1991) 8
State v. Gretzler, 659 P.2d 1 (Ariz. 1983) 5
State v. Gulbrandson, 906 P.2d 579 (Ariz. 1995) 9
State v. Hoffman, 851 P.2d 934 (Idaho 1993) 9
State v. Hoskins, 14 P.3d 997 (Ariz. 2000) 9
State v. Kleypas, 40 P.3d 139 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002) 3
State v. Knapp, 562 P.2d 704 (Ariz. 1977) 5
State v. Ortiz, 639 P.2d 1020 (Ariz. 1981) 5
State v. Pandeli, 26 P.3d 1136 (Ariz. 2001) 8
State v. Thornton, 929 P.2d 676 (Ariz. 1996) 9
Walton v. Arizona, 497 U.S. 639 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002) ..... *passim*

TABLE OF AUTHORITIES (con't.)

Statutes, Regulations and Rules:

U.S. Const. Amend. VIII 1
U.S. Const. Amend. XIV 1
28 U.S.C. § 1257(a) 1
Ariz. Rev. Stat. Ann. § 13-703(E) (1989) 7
Kan. Stat. Ann. § 21-4624(e) 1, 2

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully petitions for a writ of certiorari to review the judgment of the Kansas Supreme Court.

OPINION BELOW

The opinion of the Kansas Supreme Court (App., *infra*, 1a-77a) is reported at 102 P.3d 445 (Kan. 2004).

JURISDICTION

The opinion of the Kansas Supreme Court (App., *infra*, 1a-77a) was delivered on December 17, 2004. Petitioner's Motion for Rehearing was denied on February 2, 2005. App., *infra*, 78a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law."

Kan. Stat. Ann. § 21-4624(e) provides in relevant part that "[i]f, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in [Kan. Stat. Ann. §] 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law."

STATEMENT OF THE CASE

1. Respondent, Michael Lee Marsh II, was convicted by a jury in Sedgwick County, Kansas, of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary. App., *infra,* 9a. He was sentenced to death for capital murder, to a term of life imprisonment with no possibility for parole for 40 years for first-degree murder, and consecutive sentences of 51 months for aggravated arson, and 34 months for aggravated burglary. *Id.* at 9a-10a.

The convictions stem from the 1996 deaths of Marry Ane Pusch and her nineteen-month-old daughter, M.P. On the evening of June 17, 1996, respondent broke into the Pusch home and waited in a closet for Marry Ane to return home. Shortly after Marry Ane and M.P. entered the house, respondent came out of the closet, shot Marry Ane multiple times, stabbed her, and slashed her throat. The house was then set on fire, and the toddler, M.P., was left to burn to death.[1] *Id.* at 7a-8a.

2. In a 4-3 decision on respondent's direct appeal, the lower court held the Kansas death penalty statute, Kan. Stat. Ann. § 21-4624(e), unconstitutional on its face. The majority concluded that the weighing equation used to determine whether the death penalty was appropriate in a given case violated the Eighth and Fourteenth Amendments to the United States Constitution because it provided that a capital defendant "shall be sentenced to death," if the jury determines that the aggravating circumstances are "not outweighed by any mitigating circumstances." App., *infra,*

[1] Below, petitioner maintained that respondent set the house on fire and left M.P. to burn to death, and the jury convicted respondent for those acts. However, while finding sufficient evidence to support all of respondent's convictions, the lower court reversed his convictions for capital murder (which was based on M.P.'s death) and aggravated arson and remanded for a new trial on the grounds that certain defense evidence was improperly excluded under state law. App. *infra,* 11a-17a.

17a-31a. The majority found that this effectively directed the imposition of the death penalty if the jury determined the aggravating and mitigating circumstances weighed equal, and that such a circumstance is repugnant to the United States Constitution. *Id.* at 19a-20a.

The rationale used by the majority in making this constitutional determination is found in an earlier Kansas case, *State v. Kleypas*, 40 P.3d 139, 223-32 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002).[2] In *Kleypas,* the lower court held that the weighing equation failed to comport with this Court's Eighth Amendment jurisprudence because "it denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstance it finds exist." App., *infra*, 114a. In arriving at this conclusion, the lower court relied primarily on *State v. Biegenwald*, 524 A.2d 130 (N.J. 1987), *People v. Young*, 814 P.2d 834 (Colo. 1991), and *Hulsey v. Sargent*, 868 F. Supp. 1090 (E.D. Ark. 1993) to reject the argument that this Court approved such a weighing equation in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002). *Id.* at 98a-115a.

Rather than invalidating the entire death penalty statute however, the *Kleypas* court simply mandated that it could not be applied in a manner in which the death penalty could be imposed when the aggravators and mitigators were in equipoise, and directed that sentencing juries be instructed that in order to impose the death penalty, the aggravators must outweigh the mitigators. *Id.* at 115a-119a. In the instant case, the lower court reversed that portion of the *Kleypas* decision, but affirmed its conclusion that the weighing equation is unconstitutional. App., *infra*, 18a-31a. Significantly, the majority in the present case emphasized that "a majority of the United States Supreme Court has never squarely addressed or decided the facial

[2] The relevant portions of the lower court's decision in *Kleypas* have been provided in the Appendix. *See* App. 79a-142a.

constitutionality of the equipoise provision before us." *Id.* at 21a.

3. The majority's decision drew vigorous dissents from the remaining three justices. *Id.* at 35a-53a (Davis, J., dissenting); 54a-69a (Nuss, J., dissenting); 69a-77a (McFarland, C.J., dissenting). All three justices agreed that Kansas' death penalty provision was constitutional as written and found the majority's interpretation of the Constitution and this Court's precedent to be seriously flawed. *Id.* These dissenting justices noted that this Court in *Walton v. Arizona*, *supra* considered and found constitutional a death penalty statute that was effectively the same as the Kansas statute at issue. *Id.* at 45a-48a (Davis, J., dissenting); 54a-64a (Nuss, J., dissenting). The dissents pointed out that this Court in *Walton* rejected the very rationale used by the majority. *Id.* The dissents further observed that subsequent cases from the Ninth Circuit and the supreme courts of Arizona and Idaho interpreted *Walton* as being dispositive of this issue. *Id.* at 48a-50a (Davis, J., dissenting); 64a-69a (Nuss, J., dissenting).

REASONS FOR GRANTING THE WRIT

The decision below invalidating Kansas' death penalty statute as violating the Eighth Amendment to the United States Constitution resurrects a conflict in constitutional interpretation that this Court resolved in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002). The decision below directly conflicts with this Court's decision in *Walton*, as well as subsequent decisions of the supreme courts of Arizona and Idaho, and the Ninth Circuit. If allowed to stand, the decision below will reawaken death penalty issues and arguments that this Court laid to rest in *Walton*. For these reasons, certiorari – or even summary reversal – is warranted.

I. The Kansas Supreme Court's Decision Conflicts With This Court's Decision in *Walton v. Arizona*.

In *Walton*, this Court upheld Arizona's capital-sentencing statute against a variety of challenges, one of which was identical to the challenge asserted by respondent in this case. The Court granted certiorari to resolve a conflict between the Arizona Supreme Court and the Ninth Circuit. *Walton*, 497 U.S. at 647. In a series of decisions, the Arizona Supreme Court had interpreted its capital-sentencing statute as requiring capital defendants to demonstrate that the mitigating circumstances outweighed the aggravating circumstances and had found the statute, so construed, to be constitutional. *State v. Gretzler*, 659 P.2d 1 (Ariz. 1983) (citing *State v. Knapp*, 562 P.2d 704 (Ariz. 1977); *State v. Ortiz*, 639 P.2d 1020 (Ariz. 1981); *State v. Bishop*, 622 P.2d 478 (Ariz. 1981); *State v. Clark*, 616 P.2d 888 (Ariz. 1980)). By contrast, in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (*en banc*), the Ninth Circuit held that the Arizona statute was unconstitutional because, among other reasons, it provided for the imposition of the death penalty if the defendant failed to establish that mitigating circumstances outweighed any aggravating circumstances. The Ninth Circuit, as the lower court did here, found the statute fatally flawed "because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death." *Id.* at 1043. Consequently, the Ninth Circuit (again like the lower court here) concluded that such a statutory construction created an unconstitutional presumption in favor of the death penalty. *Id.* at 1044.

Ultimately, this Court affirmed the Arizona Supreme Court and rejected the Ninth Circuit's conclusion that the Arizona statute was unconstitutional. Of particular relevance here, the Court (in Part IV of its opinion) rejected Walton's claim that, "because [the Arizona statute] provides that the court 'shall' impose the death penalty if one or more aggravating circumstances are found and mitigating

circumstances are insufficient to call for leniency, the statute creates an unconstitutional presumption that death is the proper sentence." 497 U.S. at 651. The Court relied on its decision in *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990), which stated that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing a jury to consider all relevant mitigating evidence." *Walton*, 497 U.S. at 652. The Court also pointed to its decision in *Boyde v. California*, 494 U.S. 370, 377 (1990), which stated that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Walton*, 497 U.S. at 652. The Court concluded that "Walton's arguments in this case are no more persuasive than those made in *Blystone* and *Boyde*." *Id.*[3]

The lower court nevertheless concluded that "a majority of the United States Supreme Court has never squarely addressed or decided the facial constitutionality of the equipoise provision before us." App., *infra*, 21a. Noting that the Arizona statute at issue in *Walton* was worded differently than the Kansas statute, and that this Court's decision in *Walton* did not mention "equipoise" or refer to situations in which aggravators and mitigators were in balance, the lower court determined that this issue was not decided by the *Walton* Court. App., *infra*, 18a-21a (*Marsh* decision); 102a-105a (*Kleypas* decision). That conclusion is manifestly wrong.

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[3] Justice White was writing for four Justices rather than the Court only because Justice Scalia, who concurred in the judgment on these issues, would have held "that when a State adopts capital punishment for a given crime but does not make it mandatory, the Eighth Amendment bars it from giving the sentencer unfettered discretion to select the recipients." *Walton*, 497 U.S. at 671 (Scalia, J., concurring in part and concurring in the judgment); *Campbell v. Wood*, 18 F.3d 662, 675 n.5 (9th Cir. 1994) (discussing the Justices' votes in *Walton*).

To be sure, the wording in Arizona's law is (and was) different from the wording in Kansas' law. The Arizona statute at issue in *Walton* provided that the court "shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. §13-703(E) (1989), *quoted in Walton*, 497 U.S. at 644. As the *Walton* dissent pointed out, however, the "Arizona Supreme Court repeatedly ha[d] indicated that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' only if the mitigating factors 'outweigh' those in aggravation." *Id.* at 687 (Blackmun J., dissenting). Thus, the Arizona capital sentencing statute at issue in *Walton* operated, as relevant here, in *precisely* the same manner as Kansas' statute.

It is also true that the *Walton* Court did not use the term "equipoise." There can be no doubt, though, that Walton argued the "equipoise" issue and that the Court rejected that argument in Part IV of its opinion. Walton asserted in his brief that:

> While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. *This is because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death.* Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence. . . . *Adamson v. Ricketts*, *supra*, 865 F.2d at 1043 (footnotes omitted).

Brief of Petitioner, *Walton v. Arizona*, No. 88-7351, at 37 (emphasis added), *quoted in* App., *infra*, 57a (Nuss, J., dissenting)). It was squarely that argument which the Court addressed in Part IV, as the *Walton* dissent unhesitatingly acknowledged. 497 U.S. at 687-88 (Blackmun, J., dissenting).

Finally, reading the *Walton* decision as the lower court did is nonsensical in terms of what this Court sought to accomplish. This Court stated: "Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, . . . we granted certiorari to resolve the conflict . . . ." 497 U.S. at 647 (internal citations omitted). If the Court did not reject the Ninth Circuit's holding that the Arizona capital sentencing statute is unconstitutional "because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death," *Ricketts*, 865 F.3d at 1043, then the conflict remained unresolved. But that was not the outcome of *Walton*. Rather, this Court rejected the argument that this created an unconstitutional presumption in favor of death, and upheld Arizona's death penalty statute as interpreted by the Arizona Supreme Court.

II. The Kansas Supreme Court's Decision Resurrects a Lower Court Conflict That *Walton* Had Put to Rest.

Following *Walton*, the Ninth Circuit itself recognized that no unconstitutional presumption existed in Arizona's capital-sentencing equation and that the equipoise issue had been laid to rest. *See Richmond v. Lewis*, 948 F.2d 1473, 1481-82 (9th Cir. 1992), *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992), and *Campbell v. Wood*, 18 F.3d 662, 675 (9th Cir. 1994). Likewise, the Arizona Supreme Court understood *Walton* to validate the constitutionality of its interpretation and application of the Arizona death penalty statute. *State v. Brewer*, 826 P.2d 783, 794 (Ariz. 1992); *State v. Greenway*, 823 P.2d 22, 27 (Ariz. 1991). Since *Walton*, the Arizona Supreme Court has consistently reiterated that under Arizona law, the death penalty shall be imposed when the mitigating circumstances fail to outweigh the aggravating circumstances, and has repeatedly rejected arguments that this creates an unconstitutional presumption in favor of death. *State v. Pandeli*, 26 P.3d 1136, 1152

(Ariz. 2001); *State v. Hoskins*, 14 P.3d 997, 1016 (Ariz. 2000); *State v. Djerf*, 959 P.2d 1274, 1286 (Ariz. 1998); *State v. Thornton*, 929 P.2d 676, 686 (Ariz. 1996); *State v. Gulbrandson*, 906 P.2d 579, 605 (Ariz. 1995).

Further, the Idaho Supreme Court echoed *Walton's* holding in *State v. Hoffman*, 851 P.2d 934 (Idaho 1993). In that case, the defendant challenged the Idaho death penalty on exactly the same grounds as the respondent in the present matter challenged the Kansas death penalty: that it was unconstitutional because it required a capital defendant to establish mitigating circumstances that outweighed the aggravating circumstances. 851 P.2d at 942-43. The Idaho Supreme Court rejected that argument on the grounds that this Court had found such a statutory scheme to be constitutional in *Walton*. *Id.* at 943.

Finally, in a case not based on *Walton* but expressing similar rationale and decided almost contemporaneously with *Walton*, the Seventh Circuit rejected a similar argument that Illinois' death penalty statute created an unconstitutional presumption in favor of the death penalty. *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990). The statute at issue in *Silagy*, similar to that in *Walton*, provided that the death penalty would be imposed in a capital case if the jury determined there were no mitigating factors "sufficient to preclude the imposition of the death sentence." *Id.* at 998. There, petitioner argued that this impermissibly shifted upon him the burden of proving that death should not be imposed. However, the Seventh Circuit disagreed and found no constitutional infirmity. *Id.* at 998-99. Taking note of both *Walton* and *Silagy*, the Illinois Supreme Court subsequently rejected a similar claim that the Illinois death penalty statute created an unconstitutional presumption of death. *People v. Mitchell*, 604 N.E.2d 877, 912 (Ill. 1992).

In spite of this Court's decision in *Walton*, and the decisions of the Seventh Circuit, Ninth Circuit, and the supreme courts of Arizona, Idaho, and Illinois, rejecting

same or similar arguments as raised in the instant case, the lower court held that the death penalty statute in Kansas violated the United States Constitution. The lower court supported its position with the decisions of the New Jersey Supreme Court in *State v. Biegenwald*, 524 A.2d 130 (N.J. 1987), the Colorado Supreme Court in *People v. Young*, 814 P.2d 834 (Colo. 1991), and the United States District Court for the Eastern District of Arkansas in *Hulsey v. Sargent*, 868 F. Supp. 1090 (E.D. Ark. 1993). These decisions, however, predated *Walton*, relied primarily on state law, and/or involved highly questionable interpretations of *Walton*. *See, e.g., Young*, 814 P.2d at 845 ("The United States Supreme Court has not addressed the constitutionality of a mandatory death penalty when the jury concludes that aggravating and mitigating factors are equally balanced."). Nevertheless, they reflect a trend in thought that conflicts with this Court's reasoning established in *Walton*.

Simply put, this case involves more than an erroneous interpretation of this Court's precedent by a state court of last resort, resulting in the invalidation of a state's death penalty law (a significant issue in itself). It involves a clear conflict of constitutional interpretation, among both state supreme courts and federal courts that must be resolved.

III. The Constitutionality of Kansas' Death Penalty Statute, and Similar Statutes in Other States, Is an Important Issue That Merits This Court's Attention.

Although the lower court's determination that *Walton* did not settle this issue, and its subsequent interpretation of the United States Constitution are not binding on any other courts beyond Kansas, its decision in this matter, if left unreviewed, will provide persuasive authority for others to revive this issue and pursue constitutional challenges that this Court put to rest in *Walton*. If allowed to stand, this decision by the lower court will undermine the decisions of the Arizona and Idaho supreme courts, as well as the decisions of the Seventh and Ninth Circuits. In spite of this

Court's ruling in *Walton*, the decision below will support credible arguments that earlier interpretations of *Walton* were erroneous, and that *Walton* did not decide this issue.

This Court granted certiorari in *Walton* "to resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty." 497 U.S. at 647. The decision of the lower court revives that conflict and unsettles one of the issues this Court resolved in *Walton*. This re-emergence of a split in constitutional interpretation regarding capital sentencing presents a compelling reason for once again granting review to "resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty." *Id.*

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[Filed Dec. 17, 2004]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 81,135

STATE OF KANSAS,

Appellee,

v.

MICHAEL LEE MARSH II,

Appellant.

SYLLABUS BY THE COURT

1. The standard of review on a sufficiency of the evidence claim in a criminal appeal is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, we are persuaded that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

2. A conviction of even the gravest offense may be sustained by circumstantial evidence. It is the function of a jury and not an appellate court to weigh evidence and pass on the credibility of witnesses.

3. The evidence in this case was sufficient to establish that the defendant set the fire in issue, that one of the victim's burns was the proximate cause of her death, and that defendant acted intentionally and with premeditation in killing the other victim.

4. The purpose of a motion in limine is to assure all parties a fair and impartial trial by prohibiting inadmissible evidence, prejudicial statements, and improper questions by counsel.

5. A party whose evidence is excluded by a motion in limine has the responsibility of proffering sufficient evidence to preserve the issue on appeal.

6. No error in either the admission or the exclusion of evidence is a ground for new trial or for setting aside a

verdict unless refusal to take such action appears to be inconsistent with substantial justice. An appellate court must disregard any error or defect in a proceeding that does not affect the substantial rights of the parties.

7. Errors in violation of a constitutional right of a party are governed by the federal constitutional error rule. Under that rule, an error of constitutional magnitude may not be found harmless unless an appellate court is willing to declare a belief beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial.

8. Under the Kansas and federal Constitutions a criminal defendant is entitled to present the theory of his or her defense. Exclusion of evidence that is an integral part of the theory violates the defendant's fundamental right to a fair trial.

9. Few rights are more fundamental than that of an accused to present witnesses in his or her defense. The right to present a defense is, however, subject to statutory rules and case law interpretation of rules of evidence and procedure.

10. The general rule is that, unless otherwise provided by statute, constitutional prohibition, or court decision, all relevant evidence is admissible. Relevant evidence is evidence having any tendency in reason to prove any material fact.

11. To establish relevance, a party must show there is some material or logical connection between the asserted facts and the inference or result they are designed to establish.

12. The probative values of direct and circumstantial evidence are intrinsically similar, and there is no logically sound reason for drawing a distinction as to the weight to be assigned to each.

13. Proper application of Kansas' third-party evidence rule is limited. Although evidence of a third party's motive to commit a crime, standing alone, is not relevant, such evidence may be relevant if there is other evidence

connecting the third party to the crime. Furthermore, circumstantial evidence connecting a third party to a crime must not be excluded merely because the State relies upon direct evidence of a defendant's guilt. There is no bright line rule. Instead, the decision whether to admit third-party evidence is entrusted to the sound discretion of the district court, after evaluation of the totality of facts and circumstances in a given case under the relevance standard set forth in K.S.A. 60-407(f). To the extent earlier Kansas decisions suggest that the third-party evidence rule should be applied more broadly, they are disapproved.

14. On the record in this case, the district court's failure to engage in an evaluation of the totality of facts and circumstances under the relevance standard set forth in K.S.A. 60-407(f) in order to determine whether the defendant's third-party evidence was admissible was reversible error.

15. A party, through testimony, may open the door for otherwise inadmissible evidence.

16. The admission of circumstantial evidence of a third person's culpability is constitutionally required when the third person testifies against the defendant. A defendant's constitutional right of confrontation is violated when he or she is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias, a need to deflect suspicion, on the part of the third party.

17. On the record in this case, the district court committed reversible error by refusing to admit the defendant's third-party evidence after the third party testified against the defendant.

18. It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a

statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute.

19. Kansas courts may apply the avoidance doctrine in appropriate cases. The doctrine is characterized by application of two canons of statutory interpretation. First, the constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and, before the statute may be stricken down, it must clearly appear the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way for the court to construe the statute as constitutionally valid, it should do so. Statutes are not stricken down unless the infringement of the superior law is clear beyond a reasonable doubt. Second, a statute apparently void on its face may be constitutional when limited and construed to read the necessary requirements into it. This may be done, for example, when such an interpretation will carry out the intent of the legislature.

20. The avoidance doctrine seeks in part to minimize disagreement between the legislative and judicial branches of government by preserving enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating, through the power of precedent, statutes foreign to those the legislature intended. Those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional. In addition, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a fair one.

21. The courts' power to employ the avoidance doctrine to construe away a statute's constitutional infirmity is limited. The judiciary may not rewrite language enacted by the legislature. Rather, the doctrine applies only when a statute is ambiguous, vague, or overbroad.

22. It is recognized under the doctrine of stare decisis that, once a point of law has been established by a court, that point of law generally will be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved.

23. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law. However, courts of last resort are not inexorably bound by their own precedents. They will follow the rule of law established in earlier cases unless clearly convinced that the rule was originally erroneous or is no longer sound.

24. Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision. It is designed to protect well-settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true when the rule in question was adopted *sua sponte* and is young and previously untested.

25. K.S.A. 21-4624(e) is unambiguous. Its express language was clearly intended to mandate the imposition of a death sentence when the existence of aggravating circumstances was not outweighed by any mitigating circumstances. The legislature chose this language over alternative wording recommended by the attorney general to avoid constitutional infirmity. As a result, the statute is unconstitutional on its face under the Eighth and Fourteenth Amendments.

26. The avoidance doctrine cannot be appropriately applied to save K.S.A. 21-4624(e). Any holding to the contrary in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), is overruled.

27. On the record of this case, the evidence was sufficient to support a finding that aggravating circumstances in support of imposition of a hard 40 sentence were not outweighed by mitigating circumstances.

28. There are three exceptions to the rule that issues must have been raised in the district court before they will be addressed on appeal: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court was right for the wrong reason.

29. Kansas' hard 40 sentencing scheme as set forth in K.S.A. 2003 Supp. 21-4635(a) does not increase the statutory maximum punishment; it sets a minimum punishment. As such, it is not unconstitutional as a violation of the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

Appeal from Sedgwick district court, CLARK V. OWENS II, judge. Opinion filed December 17, 2004. Affirmed in part, reversed in part, and remanded with directions.

Rebecca E. Woodman and *Steven R. Zinn*, capital appellate defenders, argued the cause and were on the briefs for appellant.

John K. Bork, assistant attorney general, argued the cause, and *Kristafer Ailslieger*, *Jared Maag*, and *Elizabeth Reimer*, assistant attorneys general, and *Carla J. Stovall*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

ALLEGRUCCI, LUCKERT, GERNON, and BEIER, JJ.: This is an appeal by the defendant, Michael L. Marsh II,

from convictions of capital murder of Marry Elizabeth Pusch (M.P.), first-degree premeditated murder of Marry Ane Pusch (Marry), aggravated arson, and aggravated burglary. Marsh has been sentenced to death for the capital offense, life imprisonment with a mandatory minimum term of 40 years for the murder of Marry, 51 months for aggravated arson, and 34 months for aggravated burglary. The district court ordered the last three sentences to be served consecutively.

On appeal, Marsh raises 18 issues arising from the guilt phase of the trial and 16 issues from the penalty phase. We begin by observing that there is a heightened scrutiny of trial proceedings in a capital case. *Beck v. Alabama*, 447 U.S. 625, 637-38, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980). However, because we conclude K.S.A. 21-4624(e) is unconstitutional on its face, precluding application of the death penalty, we will not apply a heightened scrutiny standard of review to the remaining issues on appeal.

We deem the following issues to be controlling: (1) Is there substantial competent evidence to support each of Marsh's convictions? (2) Was evidence improperly excluded by the district court? (3) Is K.S.A. 21-4624(e) unconstitutional on its face? (4) Is there substantial competent evidence to support imposition of a hard 40 sentence for the premeditated murder of Marry? and, (5) Is the hard 40 sentencing scheme set forth in K.S.A. 2003 Supp. 21-4635(a) unconstitutional?

FACTS

On the evening of June 17, 1996, Marry and her 19-month-old daughter, M.P., were murdered in their Wichita home. Marry died as a result of multiple gunshot wounds to her head and a knife wound to her heart. The perpetrator or perpetrators apparently did not physically harm M.P before setting the house afire and leaving the child to die in the ensuing conflagration. M.P. sustained severe burns to her

body, resulting in multiple organ failure and death on June 23, 1996.

Fire investigators determined the fire was intentionally started with an accelerant applied to Marry's body. An autopsy revealed Marry had been shot 3 times, stabbed in the heart, and her throat slashed. The county coroner concluded Marry had died as a result of her wounds, with her body set afire after death.

In the initial stages of investigation, detectives interviewed Marry's husband, Eric Pusch (Pusch), who mentioned having spent most of June 17 with a friend, Michael Marsh, before going to work at approximately 4:30 p.m. as a delivery man for a local Pizza Hut. This led the police to interview Marsh.

A series of interviews with Marsh resulted in his confession to shooting Marry and abandoning M.P. when he fled the residence. He told the detectives his motive was to obtain money from the Pusch family. According to Marsh, he planned to be in the home when Marry and M.P. arrived, tie them up, and wait until Pusch got home. He would then threaten Pusch with harm to his wife and child to obtain the money needed for a trip to Alaska. Marsh indicated his plan went awry when Marry and M.P. arrived at the house earlier than he had anticipated; he panicked and shot Marry. Initially, he told detectives he could not recall how many times he pulled the trigger; subsequently, he indicated firing the gun once. Marsh was equivocal regarding the fire. At one point he indicated he probably did set the fire; at another point he stated he could not remember; and, finally, he denied setting the fire. Marsh denied Pusch was in any way involved in committing the crimes.

There was substantial evidence corroborating Marsh's confession. Marsh lived with his grandparents. Keys to the Pusch home were found discarded in a yard next to the grandparents' home. Among the items recovered during execution of a search warrant at the grandparents' residence were a .25 caliber pistol with five cartridges in the magazine,

Marsh's bloodstained tennis shoes, a pillow with bullet holes in it wrapped in duct tape, and a water bottle with duct tape around its neck. Expert testimony at trial established the pillow and bottle could be used as a makeshift silencer.

Both Marry's and M.P.'s clothing tested positive for medium petroleum vapors consistent with lighter fluid. However, Marsh's clothing and shoes tested negative for vapors. Marry's blood was found on one of Marsh's tennis shoes; inexplicably, so also was the blood of Pusch.

Prior to trial, the State filed a motion in limine to prevent Marsh from introducing circumstantial evidence suggesting that Pusch stabbed Marry and set the fire killing M.P. The State contended that Kansas law would prevent admission of circumstantial evidence tending to implicate Pusch in the face of direct evidence Marsh killed Marry and set the fire. Marsh's trial counsel argued there was substantial evidence linking Pusch to the crimes and proffered the evidence the defendant sought to introduce at trial. The district court granted the State's motion in limine, reasoning that the State's evidence against Marsh was direct and thus the defense could not present the proffered circumstantial evidence to implicate Pusch.

The jury found Marsh guilty of capital murder of M.P., first-degree murder of Marry, aggravated arson, and aggravated burglary. At the penalty phase of the trial, the State relied upon the following statutory aggravating factors to support a death sentence: (1) Marsh knowingly or purposely killed or created a great risk of death to more than one person; (2) he committed the crime in order to avoid or prevent a lawful arrest or prosecution; and (3) he committed the crime in an especially heinous, atrocious or cruel manner. See K.S.A. 21-4625. The jury found all three aggravating circumstances existed and were not outweighed by any mitigating circumstances and unanimously agreed to a sentence of death.

At sentencing, the trial judge found sufficient evidence to support the sentence of death recommended by the jury. See K.S.A. 21-4624(f). The trial judge also found the same three aggravating circumstances were not outweighed by mitigating circumstances to support imposition of a hard-40 sentence. See K.S.A. 2003 Supp. 21-4638. Marsh also was sentenced to 51 months for aggravated arson and 34 months for aggravated burglary, with all sentences to be served consecutively.

SUFFICIENCY OF THE EVIDENCE

The issue on appeal is limited to whether the evidence was sufficient to support the jury's verdict finding Marsh guilty of capital murder. Marsh contends the evidence was insufficient to establish that: (1) he set the fire; (2) M.P.'s burns were the proximate cause of her death; or (3) he intentionally killed M.P. with premeditation. When a sufficiency of the evidence issue is raised, our standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Zabrinas*, 271 Kan. 422, 441-42, 24 P.3d 77 (2001).

Marsh confessed to the crime of aggravated burglary. He admitted hiding in the Pusch home and shooting Marry in the head when she came into the bedroom. The .25 caliber pistol used to shoot Marry was subsequently found in Marsh's backpack at his grandparents' home. He admitted to attempting to start a fire with matches to conceal his crimes but claimed this was unsuccessful. Nonetheless, we know from the uncontroverted evidence there was a fire that caused burns to more than 75 percent of M.P.'s body. Although there is no direct evidence Marsh set the fire, the circumstantial evidence is sufficient for a rational factfinder to conclude beyond a reasonable doubt that he did so and that he abandoned M.P. to die in the fire.

Marsh also argues the evidence was insufficient to establish M.P.'s burns were the proximate cause of her death. This argument must fail. Both the treating physician and the medical coroner testified M.P.'s cause of death resulted from the extensive burns to her body and the related failure of internal organs. Conversely, both doctors concluded the drugs given to M.P. at the hospital did not cause her death.

A conviction of even the gravest offense may be sustained by circumstantial evidence, *State v. Penn*, 271 Kan. 561, 564, 23 P.3d 889 (2001), and it is the function of a jury and not an appellate court to weigh evidence and pass on the credibility of witnesses. *State v. Moore*, 269 Kan. 27, 30, 4 P.3d 1141 (2000). After considering all of the evidence presented to the jury for its consideration upon this issue, we conclude Marsh's sufficiency of the evidence arguments must fail.

THE EXCLUSION OF MARSH'S EVIDENCE

Marsh contends the district court erred in excluding evidence connecting Pusch to the crimes. Marsh argues the court's pretrial order in limine excluding the evidence was erroneous for two reasons: First, the Kansas third-party evidence rule only excludes motive evidence in the absence of other relevant evidence, circumstantial or direct, to connect a third party to the crime; and second, after Pusch testified as a witness for the State, the "door was opened" and the order in limine should have been disregarded.

"'The purpose of a motion in limine is to assure all parties a fair and impartial trial by prohibiting inadmissible evidence, prejudicial statements, and improper questions by counsel.'" *State v. Abu-Fakher*, 274 Kan. 584, 594, 56 P.3d 166 (2002) (quoting *Brunett v. Albrecht*, 248 Kan. 634, 638, 810 P.2d 276 [1991]). A party whose evidence is excluded by a motion in limine has the responsibility of proffering sufficient evidence to preserve the issue on appeal. *State v. Evans*, 275 Kan. 95, 99, 62 P.3d 220 (2003). We observe the State does not challenge the sufficiency of Marsh's proffer to

the district court. We conclude the issue has been properly preserved for appeal.

We acknowledge our standard of review to be as stated in *Evans*:

"K.S.A. 60-261 provides that no error in either the admission or the exclusion of evidence is a ground for granting a new trial or for setting aside a verdict unless refusal to take such action appears to be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. *State v. Leitner*, 272 Kan. 398, Syl. ¶ 7, 34 P.3d 42 (2001); *State v. Morris*, 255 Kan. 964, Syl. ¶ 6, 880 P.2d 1244 (1994).

"Errors in violation of a constitutional right of a party are governed by the federal constitutional error rule. *State v. Lyons*, 266 Kan. 591, 598, 973 P.2d 794 (1999). Under the federal constitutional error rule, an error of constitutional magnitude is serious and may not be found harmless unless the appellate court is willing to declare a belief that it was harmless beyond a reasonable doubt. Before the court may declare the error harmless, it must be able to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial. *Leitner*, 272 Kan. 398, Syl. ¶ 8; *State v. Clark*, 261 Kan. 460, 469, 931 P.2d 664 (1997); *State v. McClanahan*, 259 Kan. 86, Syl. ¶ 4, 910 P.2d 193 (1996).

"This court has previously recognized that under the state and federal Constitutions a defendant is entitled to present the theory of his or her defense and that the exclusion of evidence that is an *integral* part of that theory violates a defendant's fundamental right to a fair trial. *Mays*, 254 Kan. at 486 (quoting *State v. Bradley*, 223 Kan. 710, Syl. ¶ 2, 576 P.2d 647 [1978]); *State v. Gonzales*, 245 Kan. 691, 699, 783 P.2d 1239 (1989). '"Few rights are more fundamental than that of an accused to present witnesses in his own defense."' *Gonzales*, 245 Kan. at 699 (quoting *Chambers v. Mississippi*,

410 U.S. 284, 302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 [1973]). The right to present a defense is, however, subject to statutory rules and case law interpretation of rules of evidence and procedure. *State v. Bedford*, 269 Kan. 315, 319, 7 P.3d 224 (2000); *State v. Davis*, 256 Kan. 1, 11, 883 P.2d 735 (1994); *Bradley*, 223 Kan. at 714." *State v. Evans*, 275 Kan. at 102.

With the above standards in place, we turn to the substantive issue: Did the district court err in concluding as a matter of law that circumstantial evidence connecting Pusch to the crimes, as outlined in Marsh's proffer, was irrelevant?

The general rule is that, unless otherwise provided by statute, constitutional prohibition, or court decision, all relevant evidence is admissible. K.S.A. 60-407(f). Relevant evidence is "evidence having any tendency in reason to prove any material fact." K.S.A. 60-401(b). To establish relevance, there must be some material or logical connection between the asserted facts and the inference or result they are designed to establish. *State v. Lumley*, 266 Kan. 939, 950-51, 976 P.2d 486 (1999). We have also recognized the "probative values of direct and circumstantial evidence are intrinsically similar, and there is no logically sound reason for drawing a distinction as to the weight to be assigned to each." *State v. Scott*, 271 Kan. 103, Syl. ¶ 2, 21 P.3d 516, *cert. denied* 534 U.S. 1047 (2001).

Under the above rules of evidence, we have said: "Where the State relies on direct rather than on circumstantial evidence for conviction, evidence offered by defendant to indicate a *possible motive* of someone other than the defendant to commit the crime is incompetent *absent some other evidence to connect the third party with the crime*." (Emphasis added.) *State v. Neff*, 169 Kan. 116, Syl. ¶ 7, 218 P.2d 248, *cert. denied* 340 U.S. 866 (1950). We said in *Neff* that evidence of a third person's motive *alone* would not have any tendency to prove a material fact, but instead would serve to "confuse the jury, to permit [jurors] to indulge in speculations on

collateral matters wholly devoid of probative value relative to who committed the [crime] and to divert their attention from the main issue they were sworn to try." 169 Kan. at 123. Thus understood, the so-called third-party evidence rule has limited application and is most assuredly subordinate to the general rules of evidence and the statutory definition of relevancy in K.S.A. 60-401(b).

Our recent decision in *State v. Evans* also helps to clarify the limited application of the rule excluding third-party motive evidence. In *Evans*, the State asserted it would call two eyewitnesses to testify Evans shot the victim. In opposing the State's motion in limine, the defendant proffered the testimony of several witnesses who said they saw a third person, Reed, holding the murder weapon immediately after the shot. Thus there was direct evidence Evans shot the victim, and there was circumstantial evidence Reed shot the victim. The district court excluded the circumstantial evidence under the third-party evidence rule. 275 Kan. at 97-98. We reversed, noting that, in terms of probative value, there was no distinction between direct and circumstantial evidence. 275 Kan. at 105. We further stated:

"The trial court's exclusion of the proffered evidence was inconsistent with substantial justice and infringed upon Evans' substantial rights. The evidence Evans sought to present in this case was more than just that someone other than the defendant may have committed the crime. There was evidence that linked Reed to the commission of the crime-witnesses saw Reed holding the gun immediately after the shot was fired-and evidence that Reed subsequently admitted to shooting [the victim] and dumping his body. Under these circumstances, it was erroneous for the trial court to have excluded Evans from presenting the proffered circumstantial evidence." 275 Kan. at 106.

Both *Neff* and *Evans* clarify that, while evidence of the motive of a third party to commit the crime, standing alone, is not relevant, such evidence may be relevant if there is

other evidence connecting the third party to the crime. A corollary rule is that circumstantial evidence connecting a third party to a crime will not be excluded merely because the State relies upon direct evidence of the defendant's guilt. In short, there is no bright line rule. Instead, there must be the sound exercise of judicial discretion dependent on the totality of facts and circumstances in a given case. Here, Marsh did not merely proffer evidence of Pusch's motive. Rather, he also proffered other evidence of Pusch's connection to the crime. This required the district judge to consider whether the evidence was relevant under K.S.A. 60-407(f), and his failure to do so constitutes error.

We recognize there are decisions of our court arguably suggesting we should apply the third-party evidence rule more broadly. See *State v. Bedford*, 269 Kan. 315, 320, 7 P.3d 224 (2000); *State v. Bornholdt*, 261 Kan. 644, 666, 932 P.2d 964 (1997); *State v. Peckham*, 255 Kan. 310, 321, 875 P.2d 257 (1994); *State v. Calvert*, 211 Kan. 174, 179, 505 P.2d 1110 (1973). To the extent these cases are inconsistent with *Evans*, they are disapproved.

There are additional reasons the district court's refusal to admit the third-party evidence constituted error.

First, even under the State's inflated view of the third-party evidence rule, the rule should not have been applied as to the capital murder and the aggravated arson charges. The State's evidence on those crimes was circumstantial, not direct, because Marsh specifically denied setting the fire leading to M.P.'s death. See *Evans*, 275 Kan. at 105-06.

There also is merit to Marsh's contention that, regardless of the propriety of the district court's order in limine, it erred in failing to admit the proffered evidence after Pusch testified at trial. Marsh argues that Pusch's testimony "opened the door" to evidence connecting Pusch to the crime.

A party, through testimony, may open the door for otherwise inadmissible evidence. *State v. Bedford*, 269 Kan. at 322; *State v. McClanahan*, 259 Kan. 86, 94, 910 P.2d 193 (1996).

The admission of circumstantial evidence of a third person's culpability is constitutionally required where that third person is a government witness. 2 Jones on Evidence § 13:38 (1994) (citing the United States Supreme Court's decisions in *Olden v. Kentucky*, 488 U.S. 227, 102 L. Ed. 2d 513, 109 S. Ct. 480 [1988]; and *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 [1974]). In both *Olden* and *Davis*, the Court held a defendant's constitutional right of confrontation was violated upon a showing he was prohibited from engaging in "otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Olden*, 488 U.S. at 231; *Davis*, 415 U.S. at 318. As has been noted, "[w]hat greater motive could a witness have to lie, than to deflect suspicion from himself or herself?" 2 Jones on Evidence § 13:38.

Evidence that a witness was in fact the person who committed the crime is almost always relevant and should be admissible where the witness testifies against the defendant. However, we did uphold a district court's refusal to allow such evidence in *State v. Bedford*. It is on this case that the State bases its argument that Pusch's testimony did not open the door to evidence of his involvement in the crime.

In *Bedford*, our decision was based upon unique circumstances. Although the estranged husband in *Bedford* testified on behalf of the State, his testimony simply showed that the victim went to a bar on the day of the murder, after which he never saw the victim again. 269 Kan. at 319-321. There was apparently no testimony by him in any way connecting the defendant to the murder and thus little need to question his credibility.

Having concluded the district court erred in entering an order in limine, we turn to the issue of whether the exclusion of the third-party evidence violated Marsh's fundamental right to a fair trial. We will not unduly extend the length of this opinion with an exhaustive review of the evidence proffered by Marsh that tended to connect Pusch to the crime. The fact

is the district court misconstrued the third-party evidence rule and did not determine whether the proffered evidence was otherwise admissible under the rules of evidence. Clearly, much of the evidence sought to be introduced demonstrated more than mere motive, and we are not prepared to say beyond a reasonable doubt that the district court's error had little, if any, likelihood of altering the jury's determination that Marsh committed capital murder. See *Chapman v. California*, 386 U.S. 18, 23-24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). Upon remand, the district court must carefully consider the relevancy of each "piece" of challenged evidence to avoid prejudicing Marsh's right to present his theory of defense.

We conclude a new trial must be ordered for the crimes of capital murder and aggravated arson.

CONSTITUTIONALITY OF K.S.A. 21-4624(e)

At the penalty phase of Marsh's trial, the district court's jury instructions and verdict forms followed the language of K.S.A. 21-4624(e) by requiring a death sentence if the jury found aggravating circumstances were not outweighed by mitigating circumstances. The governing statute reads:

"If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law." K.S.A. 21-4624(e).

Under the authority of this provision, Marsh's jury was directed that a tie must go to the State. In the event of equipoise, *i.e.*, the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required.

Since Marsh's sentencing proceeding, we decided *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001).

In *Kleypas*, we first held that the weighing equation in K.S.A. 21-4624(e) as written was unconstitutional under the Eighth and Fourteenth Amendments. We avoided striking the statute down as unconstitutional on its face only by construing it to mean the opposite of what it said, *i.e.*, to require aggravating circumstances to outweigh mitigating circumstances. 272 Kan. 894, Syl. ¶ ¶ 45-48. This reasoning compelled us to vacate Kleypas' death sentence and remand the case for reconsideration of the death penalty under proper instructions on the weighing equation. 272 Kan. 894, Syl. ¶ 49.

In *Kleypas*, after the majority determined that K.S.A. 21-4624(e) as written violated the Eighth and Fourteenth Amendments, it added:

"Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise." 272 Kan. at 1016.

"The legislative intent in passing the death penalty act is obvious. K.S.A. 21-4624 provides for a death sentencing scheme by which a sentence of death is imposed for certain offenses. By simply invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist, the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the Eighth Amendment prohibition against cruel and unusual

punishment. Our holding requires that this case be remanded for the jury to reconsider imposition of the death penalty." 272 Kan. at 1018.

Here, Marsh correctly notes, and the State concedes, that *Kleypas* requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions on the weighing equation. Marsh makes the further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of our *Kleypas* decision that saved the statute through judicial construction must be overruled.

We agree.

After a discussion of applicable case law, the *Kleypas* majority succinctly summarized why K.S.A. 21-4624(e) as written did not comport with the Eighth and Fourteenth Amendments:

"The legislature cannot mandate a death sentence for any category of murder. The legislature is limited to defining who is eligible, within constitutional limits, to receive the death penalty. It is for the jury, within permissible guidelines, to determine who will live and who will die. The issue is not whether the penalty of death is per se cruel and unusual punishment. *Furman* [*v. Georgia*, 408 U.S. 238] did not hold that the death penalty was cruel and unusual punishment per se under the Eighth Amendment. Here the issue, as that before the *Furman* court, is whether the process used to select which defendant will receive the irrevocable penalty of death 'comports with the basic concept of human dignity at the core of the [Eighth] Amendment.' *Gregg* [*v. Georgia*,] 428 U.S. at 183.

"Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its 'reasoned moral response' to the mitigating circumstances? We conclude it does not. Nor does it comport

with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a 'tie goes to the defendant' when life or death is at issue. We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments." 272 Kan. at 1015-16.

In dissent, Justice Davis disagreed with the majority's holding that the weighing equation *as written* in K.S.A. 21-4624(e) was unconstitutional. 272 Kan. at 1125. Chief Justice McFarland joined in the dissent, and Justice Abbott, writing separately, concurred with Justice Davis. 272 Kan. at 1136.

Since *Kleypas* was decided, there have been no persuasive Eighth or Fourteenth Amendment cases helpful to a resolution of the facial constitutionality questions. Although *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), overruled *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), which had been relied upon by the *Kleypas* majority, it did so only on a distinct point of law, *i.e.*, whether a jury or a judge must make the findings required on aggravating and mitigating circumstances.

In their dissents today, Justices Davis and Nuss nevertheless revisit the constitutionality of K.S.A. 21-4624(e) as written. They, joined by Chief Justice McFarland, argue first that equipoise will be rare. We cannot know this.

Second, they focus on cases that predate *Walton* and analyze distinct statutory language, asserting these decisions mean the Constitution guarantees capital defendants only an opportunity to have mitigating evidence considered by the jury. These cases, obviously, do not control.

Finally, our dissenting colleagues protest that we should rely on language in Justice Blackmun's *Walton* dissent to conclude that a majority of the United States Supreme Court has already implicitly decided that the equipoise provision

before us is constitutional. Simply stated, that position failed to draw a majority in *Kleypas*; Justices Lockett, Allegrucci, Six, and Larson voted against it. It still fails to draw a majority for good reason. Although we do not believe any useful purpose is served by further extensive restatement of the opposing rationales of the *Kleypas* majority and dissent, we feel compelled to re-emphasize that a majority of the United States Supreme Court has never squarely addressed or decided the facial constitutionality of the equipoise provision before us. This remains true, no matter how lower federal courts or other state courts have interpreted the ruling in *Walton*. The Arizona statute at issue in that case was worded differently; and, as Justice Nuss acknowledges, Justice White's plurality decision neither used the word "equipoise" nor specifically referred to situations in which aggravators and mitigators are in balance. After full reconsideration, we reject reliance on Justice Blackmun's *Walton* dissent and continue to adhere to the *Kleypas* majority's reasoning and holding that K.S.A. 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendments.

This brings us to the next issue: whether *Kleypas* properly construed the statute to reverse the effect of equipoise under the weighing equation. As Justice Davis recently emphasized,

"'it is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. [Citation omitted.] The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. [Citation omitted.] Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found

in the statute. [Citation omitted.]'" *State ex rel. Graeber v. Marion County Landfill, Inc.*, 276 Kan. 328, 339, 76 P.3d 1000 (2003) (quoting *In re Marriage of Killman*, 264 Kan. 33, 42-43, 955 P.2d 1228 (1998).

We also are mindful of additional canons of statutory interpretation related to constitutional challenges:

"The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. Statutes are not stricken down unless the infringement of the superior law is clear beyond a reasonable doubt. [Citation omitted.]" *State v. Engles*, 270 Kan. 530, 531, 17 P.3d 355 (2001).

"'"[A] statute apparently void on its face may be constitutional when limited and construed in such a way as to uphold its constitutionality by reading the necessary judicial requirements into the statute. This has often been done when it is clear that such an interpretation will carry out the intent of the legislature. *State v. Motion Picture Entitled 'The Bet'*, 219 Kan. 64, 70, 547 P.2d 760 (1976); *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972); *State v. Hart*, 200 Kan. 153, 434 P.2d 999 (1967)."'" *Kleypas*, 272 Kan. at 1017.

Applying these two canons in *Kleypas*, we held that the unconstitutional weighing equation in K.S.A. 21-4624(e) could be construed to carry out the legislature's intent to enact a constitutional death penalty statute. 272 Kan. at 1018. This approach is commonly referred to by legal scholars as the "avoidance doctrine" or the "rule of constitutional doubt."

As articulated by the United States Supreme Court, the rule of constitutional doubt is that the Supreme Court will not

strike down a statute as unconstitutional if the statute can be construed, in a manner consistent with the will of Congress, to comport with constitutional limitations. This rule of constitutional construction was described as follows in *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998):

"'This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.' [Citations omitted.] The doctrine seeks in part to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held [to be] unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made. For similar reasons, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a 'fair' one."

In short, the United States Supreme Court is willing to exercise its power to construe statutes in a constitutional manner to save a legislative enactment rather than strike it down. However, both the United States Supreme Court and this court have acknowledged that the power to construe away constitutional infirmity is limited. "'Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.'" *Salinas v. United States*, 522 U.S. 52, 59-60, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a

constitutional question." *United States v. Locke*, 471 U.S. 84, 96, 85 L. Ed. 2d 64, 105 S. Ct. 1785 (1985). The maxim cannot apply where the statute itself is unambiguous. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494, 149 L. Ed. 2d 722, 121 S. Ct. 1711 (2001).

Our formulation of the avoidance doctrine is similar to that of the federal courts. In *State v. Durrant*, 244 Kan. 522, 534, 769 P.2d 1174 (1989), we stated:

"This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute. To accomplish this purpose the court may read the necessary judicial requirements into the statute."

These cases make plain that the avoidance doctrine is applied appropriately *only* when a statute is ambiguous, vague, or overbroad. The doctrine is not an available tool of statutory construction if its application would result in rewriting an unambiguous statute. The court's function is to interpret legislation, not rewrite it. *State v. Beard*, 197 Kan. 275, 278, 416 P.2d 783 (1966); *Patrick v. Haskell County*, 105 Kan. 153, 181 Pac. 611 (1919).

It is apparent to us that *Kleypas* failed to apply the fundamental rule of statutory construction as stated in *State ex rel. Graeber* before moving to application of the canons that support the avoidance doctrine. Indeed, the fundamental rule of statutory construction was not even noted in the majority's discussion and resolution of the equipoise issue.

Moreover, the *Kleypas* court's rationale for the rewriting of K.S.A. 21-4624(e) rested entirely upon the premise that the legislature intended to pass a death penalty statute that was constitutional. 272 Kan. at 1018. This begged the question of whether the legislature actually *succeeded* in doing so. It also constituted an insufficient justification for application of the avoidance doctrine to an unambiguous statute. Such construction by any other name is a usurpation of the

legislative prerogative. See *Beard*, 197 Kan. at 278; see also *People v. LaValle*, 3 N.Y. 3d 88, 817 N.E. 2d 341 (2004) (state's highest court cannot rewrite unconstitutional death penalty provision; it lacks legislative power to fill void left by elimination of invalid provision).

This point was not lost upon Justice Davis in his *Kleypas* dissent. His explanation was, and still is, persuasive:

"The majority reverses the weighing equation adopted by the legislature in K.S.A. 21-4624(e) with the idea that the intent of the legislature is to be carried out in a constitutional manner. There is no question, based on the express language of the legislature, that it intended to mandate the imposition of a death sentence where the existence of such aggravating circumstances is not outweighed by any mitigating circumstances found to exist. The precise question was brought to the attention of the legislature in testimony by the attorney general, who recommended that the statute provide for the aggravating circumstances to outweigh the mitigating circumstances before a death sentence may be imposed. The legislature rejected that suggestion of the attorney general and adopted our present statute.

"The majority, however, replaces the express language with its own language based upon its conclusion that this new language carries out the intent of the legislature in a constitutional manner. Because the new language mandated by the majority is contrary to the expressed intent and language adopted by the legislature in K.S.A. 21-4624(e), I believe the majority *invades the province of the legislature*. In the face of a clearly expressed legislative intent, the majority not only strikes this clear language as unconstitutional but adopts language exactly the opposite of what the legislature stated. If the language of the statute offends the Constitution, the appropriate judicial solution, in my opinion, is to so hold and let the legislature resolve the matter consistent with the court's opinion." 272 Kan. at 1124-25.

We agree with Justice Davis' reasoning and conclusion that the *Kleypas* majority erred in substituting a weighing equation with exactly the opposite effect of the equation provided by the legislature. The holding eviscerated the legislature's clear and unambiguous intent regarding equipoise and thus overstepped the judiciary's authority to interpret legislation rather than make it. Chief Justice McFarland's dissent, which argues that the legislature apparently did not mind the interference misses the point. (It also reads too much into its inaction when the court had removed its incentive to act.) Justice Davis had it exactly right: The appropriate, limited judicial response to the problem identified for the first time in *Kleypas* was to hold K.S.A. 21-4624(e) unconstitutional on its face and let the legislature take such further action as it deemed proper.

This was especially true given the legislative history. As the *Kleypas* majority observed:

"It is important to note that on March 14, 1995, the attorney general analyzed the statute and recommended in the House Judiciary Committee of the Kansas Legislature that the statute be amended to require that aggravating circumstances outweigh mitigating circumstances, stating: "Now if they are equal, 'tie' goes to state. We're proposing 'tie' goes to defense . . . ." Unfortunately, the legislature did not follow the attorney general's recommendation." *Kleypas*, 272 Kan. at 1014-15.

In *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), the bedrock principle of separation of powers in our tripartite form of government was at issue and eloquently explained. Padilla, an American citizen, was being held by the United States as an "enemy combatant" associated with Al Qaeda at a naval brig in South Carolina. He filed a habeas petition, relying primarily upon 18 U.S.C. § 4001(a) (2000), which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." In support of its motion to

dismiss, the Government argued a literal reading of 18 U.S.C. § 4001(a) would conflict with Article II, section 2, clause 1 of the Constitution, which makes the President of the United States "Commander in Chief of the Army and Navy of the United States."

In rejecting the government's argument, the court stated:

"The government suggests that because reading the statute to impinge on the President's Article II powers, including detention of enemy combatants, creates a danger that the statute might be found unconstitutional as applied to the present case, a court should read the statute so as not to cover detention of enemy combatants, applying the canon that a statute should be read so as to avoid constitutional difficulty. *See, e.g., Jones v. United States*, 529 U.S. 848, 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000) (citing 'the guiding principle that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."') (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 29 S. Ct. 527, 53 L. Ed. 836 (1909)).

"However, this doctrine of constitutional avoidance '"has no application in the absence of statutory ambiguity."' *HUD v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 1235, 152 L. Ed. 2d 258 (2002) (quoting *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001)). Any other approach, as pointed out in *Rucker*, '"while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution."' *Id.* at 1235-36 (quoting *United States v. Albertini*, 472 U.S. 675, 680, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985)). That is, if a court read an ambiguity into an unambiguous statute simply for the purpose of avoiding an adverse decision as to the constitutionality of that statute, the court would be exercising

legislative powers and thereby usurping those powers. There is no ambiguity here. The plain language of the statute encompasses all detentions of United States citizens. Therefore, the constitutional avoidance canon cannot affect how the statute is read." 233 F. Supp. 2d at 597.

Our holding that K.S.A. 21-4624(e) is unconstitutional on its face presumptively requires that we overrule that portion of *Kleypas* upholding the statute through application of the avoidance doctrine. The only contrary argument left for our consideration is that the doctrine of stare decisis should prevent us from doing so.

In *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 356, 789 P.2d 541(1990), *overruled on other grounds Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991), we stated:

"It is recognized under the doctrine of stare decisis that, once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by this court. . . . The application of stare decisis ensures stability and continuity demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law.

". . . The general American doctrine as applied to courts of last resort is that a court is not inexorably bound by its own precedents but will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is not longer sound because of changing conditions and that more good than harm will come by departing from precedent."

This is consistent with the United States Supreme Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, 525, 123 S. Ct. 2472 (2003), in which the Court

overruled its 1986 decision in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). The Court stated:

"The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne v. Tennessee*, 501 U.S. 808, 828, 115 L. Ed.2d 720, 111 S. Ct. 2597 (1991) ('*Stare decisis* is not an inexorable command; rather, it "'is a principle of policy and not a mechanical formula of adherence to the latest decision, [however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience]'" (quoting *Helvering v. Hallock*, 309 U.S. 106, 119, 84 L. Ed. 604, 60 S. Ct. 444 (1940))." 539 U.S. at 577.

Similarly, in *Ring*, 536 U.S. 584, the Court observed that, "[a]lthough '"the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]" . . . [o]ur precedents are not sacrosanct.' *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), (quoting *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494 (1987). '[W]e have overruled prior decisions where the necessity and propriety of doing so has been established.' 491 U.S. at 172."

In particular, the United States Supreme Court has frequently emphasized that stare decisis has less persuasive force in constitutional adjudication. As Justice Scalia stated in *Vieth v. Jubelirer*, 541 U.S. 267, ___, 158 L. Ed 2d 546, 124 S. Ct. 1769, 1792 (2004), which overturned precedent concerning congressional redistricting:

"Considerations of stare decisis do not compel us to allow *Bandemer* to stand. That case involved an interpretation of the Constitution, and the claims of stare decisis are at their weakest in that field, where our mistakes cannot be corrected by Congress. See *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2697, 115 L. Ed. 2d 720 (1991). They are doubly weak in *Bandemer* because the majority's inability to

enunciate the judicially discernible and manageable standard that it thought existed (or did not think did not exist) presaged the need for reconsideration in light of subsequent experience. And they are triply weak because it is hard to imagine how any action taken in reliance upon *Bandemer* could conceivably be frustrated – except the bringing of lawsuits, which is not the sort of primary conduct that is relevant.

"While we do not lightly overturn one of our own holdings, 'when governing decisions are unworkable or are badly reasoned, "'this Court has never felt constrained to follow precedent.'" *Id.*, at 827, 111 S. Ct. 2597 (quoting *Smith v. Allwright*, 321 U.S. 649, 665, 64 S. Ct. 757, 88 L. Ed. 2d 987 (1944)). Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims." 541 U.S. at ___, 158 L. Ed. 2d at 575-76. See also *Harris v. United States*, 536 U.S. 545, 581, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (Thomas, J., dissenting) (when court "has wrongly decided a constitutional question, the force of stare decisis is at its weakest"; relative recency of rule also weakens precedential value).

Furthermore, a rule not previously subjected to "full-dress argument" is rightly examined more closely before it is applied a second time. See *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 571, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993). Such should be the case with our *sua sponte* application of the avoidance doctrine in *Kleypas*. Although we should not casually discard precedent, neither should we shy away from admitting "'when governing decisions are unworkable or are badly reasoned.'" *United States v. Dixon*, 509 U.S. 688, 712, 125 L. Ed. 2d 556, 113 S. Ct. 2849 (1993) (citing *Payne v. Tennessee*, 501 U.S. at 827).

The Chief Justice's dissent focuses on factors listed by Justice O'Connor in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992), "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." 505 U.S. at 854-55. But Justice O'Connor explicitly labeled "examples." Any exhaustive list of such considerations necessarily would also include whether the court now recognizes that its earlier ruling was incorrect, unwise, or did violence to the roles assigned the various branches of government.

We conclude that the second holding of *Kleypas* – that the equipoise provision could be rescued by application of the avoidance doctrine – is not salvageable under the doctrine of stare decisis. That holding of *Kleypas* is overruled. Stare decisis is designed to protect well settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true in a situation like the one facing us here. *Kleypas*' application of the avoidance doctrine was not fully vetted. It is young and previously untested. Its rewriting of K.S.A. 21-4624(e) was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature.

Our decision today to confine the application of the avoidance doctrine to appropriate circumstances recognizes the separation of powers and the constitutional limitations of judicial review and rightfully looks to the legislature to resolve the issue of whether the statute should be rewritten to pass constitutional muster. This is the legislature's job, not ours. This decision does more in the long run to preserve separation of powers, enhance respect for judicial review, and further predictability in the law than all the indiscriminate adherence to stare decisis can ever hope to do.

HARD 40 SENTENCE SUFFICIENCY

Marsh contends there was insufficient evidence to support the district court's finding of aggravating circumstances not outweighed by mitigating circumstances. See K.S.A. 2003 Supp. 21-4635. Where the sufficiency of the evidence is challenged for establishing the existence of an aggravating circumstance in a hard 40 proceeding, the standard of review to be applied is whether, after reviewing all the evidence, viewed in the light most favorable to the State, a rational factfinder could have found the existence of the aggravating circumstances by a preponderance of the evidence.

In imposing the hard 40, the district court found the same aggravators as did the jury in imposing the death penalty: (1) the defendant knowingly or purposely killed or created a great risk of death to more than one person; (2) the killing was especially heinous, atrocious, or cruel; and (3) the killing was committed in order to avoid or prevent a lawful arrest or prosecution. Further, in applying the weighing equation as required in K.S.A. 2003 Supp. 21-4635, the district judge stated:

"I believe that these aggravating factors, *each one individually – that you wouldn't necessarily need to take the three of them as a whole combined – that any one of those three are sufficient to outweigh any mitigating circumstances in this case* regarding the death of [Marry], which would require the imposition of the maximum penalty." (Emphasis added.)

Because we have concluded Marsh is entitled to a new trial on the charge of capital murder, a finding he knowingly or purposely killed or created a great risk of death to more than one person is problematic. Likewise, the district court's failure to admit evidence of Pusch's possible involvement could arguably influence the finding that Marry's killing was especially heinous, atrocious, or cruel. There does exist, however, sufficient evidence to support the district court's finding that Marry's murder was committed by Marsh to

avoid or prevent a lawful arrest or prosecution. In his confession to investigators, Marsh indicated that, after he entered the Pusch residence, he decided not to carry out the extortion; but Marry's early arrival threw him into a panic, and he shot her. The district court could reasonably infer Marsh shot Marry to avoid lawful arrest or prosecution for aggravated burglary. Conversely, the mitigating evidence presented by Marsh consisted of several character witnesses who testified to Marsh's character at the time they had known him.

We conclude, based upon the district court's statement, that any one of the aggravating circumstances was not outweighed by mitigating circumstances. The district court's imposition of the hard 40 sentence is upheld. See *State v. Lopez*, 271 Kan. 119, 141, 22 P.3d 1040 (2001) (stating the district court's weighing of aggravating and mitigating circumstances is within its sound discretion and will not be disturbed on appeal absent an abuse of discretion.)

HARD 40 SENTENCE CONSTITUTIONALITY

Marsh argues the Kansas hard 40 sentencing scheme is unconstitutional because K.S.A. 2003 Supp. 21-4635 does not require aggravating circumstances to be submitted to a jury and proved beyond a reasonable doubt. He contends *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert. denied* 532 U.S. 932 (2001), should be overruled.

This argument was not made to the district court. Normally, constitutional grounds asserted for the first time are not properly before this court for review. *State v. Shears*, 260 Kan. 823, 837, 925 P.2d 1136 (1996). However, we have long recognized three exceptions to this rule: (1) where the newly asserted claim involves only a question of law arising on proved or admitted facts and determinative of the case; (2) where consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) where the district court is right for the wrong reason. See *Pierce v. Board of County Commissioners*, 200 Kan. 74,

80-81, 434 P.2d 858 (1967). Here, the issue raised by Marsh requires we address only a question of law.

In *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), the United States Supreme Court held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Conley*, we held the hard 40 sentencing scheme did not increase the statutory maximum, but rather simply set a statutory minimum. See 270 Kan. at 33-34. We also concluded our holding was consistent with the United States Supreme Court's pronouncement in *McMillan v. Pennsylvania*, 477 U.S. 79, 88-89, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986). In *McMillan*, the Court held a judicial finding of aggravating factors that only raises the minimum sentence that may be imposed by the district court was permissible. 477 U.S. at 89.

Marsh argues the United States Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584, requires us to reverse our holding in Conley. We disagree. In *State v. Boldridge*, 274 Kan. 795, 57 P.3d 8 (2002), this court addressed a constitutional challenge to the hard 50 sentencing scheme under K.S.A. 2001 Supp. 21-4635. The court noted the defendant's reliance on *Ring* but found no reason to alter its reasoning and holdings in *State v. Douglas*, 274 Kan. 96, 49 P.3d 446 (2002), *Conley*, and *State v. Boorigie*, 273 Kan. 18, 41 P.3d 764 (2002). *Boldridge*, 274 Kan. at 812.

Additionally, Marsh contends we misread *McMillan* in deciding *Conley*. This is not a novel argument. We have consistently declined to overrule *Conley* and have rejected the argument that our reliance on *McMillan* was misplaced. See *State v. Albright*, 273 Kan. 811, 826-27, 46 P.3d 1167 (2002). The decision in *Harris v. United States*, 536 U.S. 545, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002), decided the same day as *Ring*, reaffirms the continuing validity of

McMillan. In *Harris*, the Supreme Court considered *Apprendi* but held that increasing a defendant's minimum sentence based upon a judge's finding that a weapon was brandished did not violate the Fifth or Sixth Amendments. *Harris*, 536 U.S. at 568.

For the foregoing reasons, we reject Marsh's argument that *Conley* was wrongly decided and should be overruled.

CONCLUSION

We conclude K.S.A. 21-4624(e) is unconstitutional on its face, thus rendering moot guilt and penalty phase issues dependent on imposition of the death penalty. We have carefully considered all of the issues of trial error raised by Marsh; we hold those not discussed in this opinion insufficient to constitute reversible error in this case.

We affirm Marsh's convictions and sentences for aggravated burglary and the premeditated murder of Marry; we reverse and remand for new trial Marsh's convictions for the capital murder of M.P. and aggravated arson.

DAVIS, J., dissenting: I respectfully dissent from the majority's holding that the weighing equation in K.S.A. 21-4624(e) is unconstitutional on its face. In my opinion, K.S.A. 21-4624(e) was constitutional when it was passed by the Kansas Legislature and remains constitutional today.

The majority holds that the Kansas death penalty is unconstitutional on its face under the Eighth Amendment to the United States Constitution. According to the majority, the offending provision lies in the following weighing equation found in K.S.A. 21-4624(e):

"If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the *existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist*, the defendant shall

be sentenced to death; otherwise, the defendant shall be sentenced as provided by law." (Emphasis added.)

In *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), the majority held that the above weighing equation was unconstitutional but attempted to salvage the death penalty by rewriting the equation language to provide that the aggravating circumstances must outweigh the mitigating circumstances before death may be imposed. The majority today holds that the attempt in *Kleypas* was erroneous and that the entire death penalty is unconstitutional under the Eighth Amendment.

The majority, in this case, voids the entire death penalty law because in the extremely unlikely event that a jury would find that the aggravating circumstance or circumstances exactly equal the mitigating circumstances, death must be imposed. The majority claims that in such an unlikely event a tie must go to the defendant. According to the majority, because under the weighing equation adopted by the Kansas Legislature the tie goes to the State, the entire death penalty is unconstitutional.

I begin with the majority's conclusion that in order for the death penalty to be constitutional in Kansas, *a tie in the aggravating circumstances and mitigating circumstances must go to the defendant* under the Eighth Amendment. I agree with the majority that the Kansas Legislature consciously chose the weighing equation but strongly disagree that the language used is unconstitutional under the Eighth Amendment. I may personally disagree with the legislature's policy decision that a tie goes to the State but I cannot conclude that its enactment is unconstitutional because of that language unless the United States Constitution, as interpreted by the United States Supreme Court, supports such a conclusion. An analysis of the United States Supreme Court jurisprudence, as well as other decisions addressing this point, does not support such a conclusion and, in fact, supports the opposite conclusion.

As a prelude to my analysis, I think it is important to stress just how unlikely it is that the "tie" envisioned by the majority would ever occur. First, before the weighing equation is even implicated, it must be proven beyond a reasonable doubt that the defendant is guilty of the crime of capital murder. Thus, for the defendant to even be eligible for the death penalty, a jury must find the existence of one or more of the following factors that make the murder committed more serious then even first-degree murder: (1) the intentional and premeditated killing of any person in the commission of kidnapping or aggravated kidnapping with the intent of holding such person for ransom; (2) the intentional and premeditated killing of any person pursuant to contract or agreement; (3) the intentional and premeditated killing of any person by an inmate or prisoner; (4) the intentional and premeditated killing of the victim of rape, criminal sodomy, or aggravated criminal sodomy; (5) the intentional and premeditated killing of a law enforcement officer; (6) the intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or (7) the intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping or aggravated kidnapping where such crime was committed with the intent to commit a sex offense upon or with the child or with intent that the chiid commit or submit to a sex offense. See K.S.A. 21-3439.

Once the defendant has been convicted of capital murder, he or she is death eligible. However, the death sentence may still not be imposed without a consideration of an additional set of aggravating circumstances and a consideration of mitigating circumstances. The aggravating circumstances are set forth in K.S.A. 21-4625, as follows:

"(1) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.

"(2) The defendant knowingly or purposely killed or created a great risk of death to more than one person.

"(3) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

"(4) The defendant authorized or employed another person to commit the crime.

"(5) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

"(6) The defendant committed the crime in an especially heinous, atrocious or cruel manner.

"(7) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

"(8) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding."

These eight categories of aggravating circumstances, all extremely serious, qualify a defendant for death only after the prosecution has proved the existence of one or more of them beyond a reasonable doubt. However, death may still not be imposed without consideration of mitigating circumstances.

A nonexclusive list of mitigating circumstances that a defendant may present to the jury are set out in K.S.A. 2003 Supp. 21-4626:

"(1) The defendant has no significant history of prior criminal activity.

"(2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(3) The victim was a participant in or consented to the defendant's conduct.

"(4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

"(5) The defendant acted under extreme distress or under the substantial domination of another person.

"(6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

"(7) The age of the defendant at the time of the crime.

"(8) At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim."

As stated above, these mitigating circumstances are nonexclusive. Thus, the jury is instructed that mitigating circumstances it may consider also include that "[a] term of imprisonment is sufficient to defend and protect the people's safety from the defendant" as well as "any other aspect of the defendant's character, background or record, and any other aspect of the offense which was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death." See PIK Crim. 56.00-D (2003 Supp.).

Note again the serious nature of the mitigating circumstances and the fact that there is no limit on mitigating circumstances that a defendant may present to the jury. Also note that the defendant is not required to prove these circumstances beyond a reasonable doubt.

For example, assume that a defendant kills a witness who was to testify against him in his upcoming criminal trial (aggravating circumstance). Assume further that the defendant is 19 years old at the time, came from a broken home, was abused as a child, and has no significant past criminal history (mitigating circumstances). Once the prosecution has presented evidence of the aggravating

circumstance(s) and the defendant has presented as much mitigating evidence as he wishes to the jury, it is now up to the jury to determine whether to impose the death sentence. Under our law, if the mitigating circumstances outweigh the aggravating circumstance(s) death *cannot* be imposed. If aggravating circumstances outweigh mitigating circumstances death *is* imposed. Before deliberations, the jury is instructed similar to the following:

1. If the jury unanimously finds beyond a reasonable doubt that the aggravating factor exists, and that the aggravating factor outweighs the mitigating circumstances found to exist, the sentence is death.

2. If the jury unanimously finds beyond a reasonable doubt that the aggravating factor exists, and that the mitigating circumstances found to exist outweigh the aggravating circumstance, a prison sentence is the sentence.

3. If the jury unanimously finds beyond a reasonable doubt that the aggravating factor exists, and that the aggravating factor is not outweighed by any mitigating circumstances found to exist (this would include situations where aggravating factor and mitigating circumstances are equal), the defendant is sentenced to death.

Each member of the jury then decides whether the aggravating factor has been proven beyond a reasonable doubt. Unless the jury unanimously concludes that at least one aggravating factor has been proven, death cannot be imposed. Once an aggravating factor has been proven, each juror decides what weight to give that aggravating factor and then what weight to give the mitigating factors. The total weight of the aggravating factor and the mitigating factors are then compared. In order to impose death, each member of the jury must find that the aggravating factor is not outweighed by the mitigating factors. If even one member of the jury finds that the aggravating factor is outweighed by the mitigating factors, then the defendant cannot be sentenced to death. Further, as noted above, the jury is not

limited on what mitigating evidence it can consider. Thus, even if a juror in our example determines that the mitigating circumstances offered by the defendant, *i.e.*, that he was 19 years old at the time, came from a broken home, was abused as a child, and has no significant criminal history, are insufficient to outweigh the aggravating factor, that juror still does not have to vote for death if there is any other circumstance or circumstances which in the juror's mind pushes the weight of the mitigating circumstances past the aggravating circumstance. Such circumstances can include the juror's feeling that life in prison is a sufficient sentence or simply that the defendant does not deserve to die.

As can be seen by the above example, the weighing process is not just a process of counting aggravating and mitigating circumstances. It is a process of assessing intangibles: looking at the total weight of the aggravating factors and comparing it to the total weight of the mitigating circumstances. It is for this reason that it is highly unlikely the jury will conclude that the aggravating circumstances and mitigating circumstances are exactly equal. Either the mitigating circumstances will outweigh the aggravating circumstances and a life sentence will be imposed or the aggravating circumstances will outweigh the mitigating circumstances and death will be imposed.

In the extremely unlikely event that the jury does find the aggravating circumstances and the mitigating circumstances to be exactly equal, K.S.A. 21-4624(e), as written, does mandate that the sentence be death. However, a careful examination of the United States Supreme Court's death penalty jurisprudence shows that this result does not violate the Eighth Amendment.

There is no question that the Eighth Amendment imposes several requirements with regard to capital sentencing. First, states are required to limit and channel the discretion of judges and juries "so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S.

153, 189, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976). In order for a capital sentencing scheme to pass constitutional muster, it must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983).

The Kansas Death Penalty Act narrows the class of persons eligible for the death penalty in two ways. First, it requires a conviction of capital murder for death penalty eligibility rather than simply applying the death penalty to all first-degree murders. Second, it narrows that eligibility even further through the weighing of aggravating and mitigating factors during the penalty phase. Thus, the Kansas Legislature has limited and channeled the discretion of judges and juries "so as to minimize the risk of wholly arbitrary and capricious action" in accord with *Gregg v. Georgia*.

Further, even though the Eighth Amendment requires that jury discretion be guided, it also requires that the sentencer be allowed to retain sufficient discretion to consider all relevant mitigating evidence, so that it can ensure that "'death is the appropriate punishment in a specific case.'" *Lockett v. Ohio*, 438 U.S. 586, 601, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976). To this end, the sentencer cannot "be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. Further, the sentencer must be able to "give effect" to this evidence. *Penry v. Lynaugh*, 492 U.S. 302, 328, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989). Again, it must be noted that Kansas lists eight important mitigating circumstances and puts no limit on the number of such circumstances a defendant may

present. The jury is instructed that it must consider and give effect to this evidence.

Once these core principles are satisfied, however, the Eighth Amendment requires no more. Rather, the Supreme Court has made it clear that within the above guidelines, states are given wide latitude to adopt the procedure through which these principles are carried out. See *Zant v. Stephens*, 462 U.S. at 890-91 (stating that "*the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances*"). (Emphasis added.) The majority opinion says that the failure of the legislature to allow death only when aggravating circumstances outweigh mitigating circumstances is unconstitutional.

In enacting its death penalty statute, Kansas has chosen to follow the Florida system, which provides for aggravating circumstances which are then weighed against any mitigators found to exist as set forth above. See *Stringer v. Black*, 503 U.S. 222, 229-231, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). The Supreme Court held that the Florida system satisfied constitutional requirements in *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976).

In states which follow the Florida system, *i.e.* "weighing states," questions have arisen over the composition of the weighing equation. The Supreme Court answered those questions in a series of three cases: *Blystone v. Pennsylvania*, 494 U.S. 299, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990); *Boyde v. California*, 494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990); and *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), *overruled on other grounds Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002).

In *Blystone*, the question was whether having a mandatory weighing equation which required death where the jury found that the aggravating circumstances outweighed the mitigating circumstances violated the Constitution. The

argument was that this mandatory penalty somehow "limited the discretion of the jury" in contravention of *Lockett*'s requirement that a capital jury be allowed to consider and give effect to all relevant mitigating evidence. See *Blystone*, 494 U.S. at 303.

The Supreme Court held that the Pennsylvania scheme satisfied the *Lockett* requirement for two reasons. First, the statute did not limit the mitigating factors that could be taken into account (Kansas does not limit the mitigating factors). Second, it did not automatically mandate death upon conviction for certain types of murder (nor does Kansas); rather, it mandated the imposition of death only after a finding that the aggravating circumstances outweighed the mitigating circumstances. 494 U.S. at 305-06. The Supreme Court stated that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." 494 U.S. at 307. Further, the Supreme Court noted that it was not particularly concerned with the form or procedure used in establishing weighing equations so long as the requirement that the jury be allowed to consider and give effect to all relevant mitigating evidence is satisfied, stating: "*Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.*" (Emphasis added.) 494 U.S. at 309.

The next case concerning weighing equations, *Boyde v. California*, addressed a similar question with regard to California's weighing equation, which mandated death upon a jury's finding that the aggravating circumstances outweigh mitigating circumstances. The Supreme Court in *Boyde*, for the same reasons as in *Blystone*, found the statute constitutional. In the process, the Supreme Court reiterated that "'[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence'" and further stated that "there is no . . . constitutional requirement of unfettered sentencing

discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" 494 U.S. at 377.

Blystone and *Boyde* stand, therefore, for the proposition that it is not unconstitutional for a weighing equation to mandate death upon certain findings, so long as the jury is allowed to consider and give effect to all relevant mitigating circumstances. They also confirm that a weighing equation which mandates death upon the jury's finding that aggravating circumstances outweigh mitigating circumstances satisfies this standard. They did not, however, address whether other versions of the weighing equation, specifically the weighing equation used in K.S.A. 21-4624(e), meet this standard. That question was left for the next "weighing equation" case, *Walton v. Arizona*, 497 U.S. 639.

Walton is particularly important to this case because of the similarities between the weighing equation at issue in *Walton* and that in K.S.A. 21-4624. The Arizona weighing equation in *Walton* provided that the sentencer (in that case, a judge) was to weigh the aggravating circumstances against the mitigating circumstances and impose death if there were "no mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 643-44. Although the words used are different, Arizona, then and now, has interpreted this weighing equation to mean exactly the same as the one used in K.S.A. 21-4624(e): Death is the penalty unless the aggravating circumstances are outweighed by the mitigating circumstances. See *State v. Gretzler*, 135 Ariz. 42, 53-55, 659 P.2d 1 (1983); *State v. Ysea*, 191 Ariz. 372, 375, 956 P.2d 499 (1998) (stating that "[i]f the judge finds one or more of the aggravating factors listed in § 13-703[F], the defendant is death eligible, and if the aggravating factors are not outweighed by mitigating factors listed in § 13-703[G], the resulting sentence is death"). See also *Walton*, 497 U.S. at 687 (Blackmun, J., dissenting) (stating that "[t]he Arizona

Supreme Court repeatedly has indicated that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' only if the mitigating factors 'outweigh' those in aggravation").

Further, one of the issues in *Walton* was the same equipoise question faced in *Kleypas* and now in this case, the validity of the weighing equation under the Eighth Amendment. See *Walton*, 497 U.S. at 651-52. In order to understand the Court's holding on the issue, it is important to note that *Walton* reached the Supreme Court in part as the result of a split between the Arizona Supreme Court and the Ninth Circuit Court of Appeals on the equipoise issue. In *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc), the Ninth Circuit Court of Appeals held that the Arizona death penalty scheme was unconstitutional for the same reason the majority opinion in this case holds the Kansas statute K.S.A. 21-4624(e) unconstitutional:

"While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. *This is because in situations where the mitigating and aggravating circumstances are in balance*, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that '[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect.'" 865 F.2d at 1043-44. (Emphasis added.)

This ruling, however, conflicted with the decision of the Arizona Supreme Court which summarily upheld the constitutionality of the Arizona death penalty scheme in *State v. Walton*, 159 Ariz. 571, 584-85, 769 P.2d 1017 (1989). In order to resolve this split between the two cases, the United States Supreme Court granted *certiorari* in

Walton. See *Walton*, 497 U.S. at 647 ("Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, see *Adamson v. Ricketts* [citation omitted], we granted certiorari . . . to resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty.").

The Supreme Court of the United States addressed Walton's argument that because the Arizona statute provided that the court must impose the death penalty if one or more aggravating circumstances are found and the mitigating circumstances are insufficient to call for leniency, this created an unconstitutional presumption that death was the proper sentence. 497 U.S. at 651-52. The Court rejected this contention, stating:

"Our recent decisions in *Blystone v. Pennsylvania* [citation omitted] and *Boyde v. California* [citation omitted] foreclose this submission. *Blystone* rejected a challenge to a jury instruction based on a Pennsylvania statute requiring the imposition of the death penalty if aggravating circumstances were found to exist but no mitigating circumstances were present. We pointed out that '[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence,' [citation omitted] and concluded that because the Pennsylvania statute did not preclude the sentencer from considering any type of mitigating evidence, [citation omitted] it was consonant with that principle. In addition, the Court concluded that the statute was not 'impermissibly "mandatory" as that term was understood' in *Woodson v. North Carolina* [citation omitted] and *Roberts v. Louisiana* [citation omitted] because it did not automatically impose death upon conviction for certain types of murder. [Citation omitted.] The same is true of the Arizona statute.

"Similarly, *Boyde v. California*, *supra*, upheld a pattern jury instruction which stated that '[i]f you conclude that the

aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.' [Citation omitted]. The Court specifically noted that 'there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and *States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.*'" [Citation omitted.]

"Walton's arguments in this case are no more persuasive than those made in *Blystone* and *Boyde*." (Emphasis added.) 497 U.S. at 651-52.

Justices Blackmun, Brennan, Marshall, and Stevens dissented from this holding, arguing that the fact that the Arizona statute required death if the aggravating and mitigating circumstances were in equipoise violated the Eighth Amendment. See 497 U.S. at 687 (Blackmun, J., dissenting). The dissenting opinion in *Walton* is the reason the majority in this case holds K.S.A. 21-4624(e) unconstitutional. *Walton*, however, rejected the equipoise argument, holding just the opposite of the majority opinion in this case.

Walton not only reaffirmed the holdings in *Blystone* and *Boyde* that it is not a violation of the Eighth Amendment to mandate death upon certain findings, such as that the aggravating factors outweigh the mitigating factors, but also extended that rationale to a weighing equation such as that used in Arizona which mandated death unless the mitigating factors were sufficiently substantial to call for leniency, that is, unless aggravating factors were not outweighed by the mitigating circumstances.

It is clear to me that the United States Supreme Court's opinion in *Walton* answered the equipoise question. The Ninth Circuit certainly thought it did. In *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992), it recognized that *Walton* overturned its decision in *Adamson v. Ricketts* regarding the constitutionality of the Arizona death penalty. The Idaho

Supreme Court also thought so. In *State v. Hoffman*, 123 Idaho 638, 646-47, 851 P.2d 934 (1993), the Idaho Supreme Court found that under *State v. Walton*, its statute which required a defendant to prove mitigating circumstances which outweighed aggravating circumstances was constitutional. The Illinois Supreme Court, in a decision which actually predated *Walton*, cited *Blystone* for this same proposition. See *People v. Thomas*, 137 Ill. 2d 500, 542, 561 N.E.2d 57 (1990).

Cases decided by the United States Supreme Court since *Blystone*, *Boyde*, and *Walton* have continued with the theme established in those cases. In *Harris v. Alabama*, 513 U.S. 504, 512, 130 L. Ed. 2d 1004, 115 S. Ct. 1031 (1995), the Supreme Court, in finding that Alabama's death penalty scheme was not unconstitutional even though it did not give the judge guidance in determining whether to accept the jury's advisory verdict, reiterated: "We have rejected the notion that 'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.'" Similarly, in *Buchanan v. Angelone*, 522 U.S. 269, 276, 139 L. Ed. 2d 702, 118 S. Ct. 757 (1998), the Court stated:

"In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. [Citations omitted.] *However, the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence.* [Citations omitted.] Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence.

"But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." (Emphasis added.)

Given the United States Supreme Court's continued insistence that the Constitution does not require a specific method for balancing aggravating and mitigating circumstances, and its specific approval of Arizona's weighing equation which is identical in practice to that in K.S.A. 21-4624(e), I find it difficult to understand how the majority comes to its conclusion that K.S.A. 21-4624(e) is unconstitutional on its face. Certainly, the conclusion cannot come from the cases which have addressed the subject. The few cases from other jurisdictions which might lend support the majority's conclusion are entirely unpersuasive.

Besides our opinion in *Kleypas*, a weighing equation such as the one used in K.S.A. 21-4624(e) has been declared unconstitutional in only four cases: the aforementioned Ninth Circuit opinion in *Adamson v. Ricketts*, 865 F.2d 1011; *Hulsey v. Sargent*, 868 F. Supp. 1090 (E.D. Ark. 1993); *People v. Young*, 814 P.2d 834 (Colo. 1991); and *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987). The circumstances of each of these cases, however, give them little weight.

First, *Adamson*, as the Ninth Circuit Court recognized, was abrogated by the Supreme Court's opinion in *Walton* v. Arizona. See *Adamson v. Lewis*, 955 F.2d at 619. This abrogation also causes problems for *Hulsey v. Sargent*, in that the federal district court in that case relied entirely on *Adamson v. Ricketts* for its decision and did not even mention the effect of *Walton*. See 868 F. Supp. at 1103. It is highly questionable whether the decision in *Hulsey* would have survived review by the Eighth Circuit Court of Appeals, given its express reliance on *Adamson v. Ricketts* and the Ninth Circuit's determination that *Adamson v. Ricketts* was abrogated by *Walton*. The State's appeal in *Hulsey*, however, was dismissed by the Eighth Circuit because the State failed to timely file its notice of appeal. See *Hulsey v. Sargent*, 15 F.3d 115, 118-19 (8th Cir. 1994).

Nor are the two state cases, *Biegenwald* and *Young*, persuasive. *Biegenwald* was decided in 1987, before *Blystone*, *Boyde*, and *Walton*. The New Jersey Supreme Court in *Biegenwald* found that "fundamental fairness" required that the defendant get the benefit of the doubt where the "explanations for his misconduct were equally as significant as the culpable aspects of that misconduct." See 106 N.J. at 62. However, this argument for fundamental fairness was not keyed to the United States Constitution but rather to New Jersey's "traditional concern for the rights of defendants charged with capital offenses" and the legislative history of the adoption of the weighing equation which suggested that the New Jersey legislature had actually meant to adopt a different equation requiring the aggravating factors to outweigh the mitigating factors. See 106 N.J. at 59-60.

Similarly, in *Young* the Colorado Supreme Court determined that a weighing equation which mandated death when the aggravating and mitigating factors were in equipoise would violate the requirement that a death penalty scheme would be rational and reliable. See 814 P.2d at 845. In reaching this conclusion, the court distinguished the holding in *Walton* by clearly misinterpreting the Arizona weighing equation, stating that under the Arizona weighing equation, "[t]he sentencer must also determine whether those mitigating factors are outweighed by the aggravating factors . . . or, stated alternatively, are sufficient to call for leniency." 814 P.2d at 846. As noted above, the Arizona weighing equation is in reality, the opposite. See *Walton*, 497 U.S. at 687 (Blackmun, J., dissenting); *State v. Gretzler*, 135 Ariz. at 53-55. This misconstruction allowed the *Young* court to lump *Walton*'s approval of the Arizona weighing equation in with the Supreme Court's approval of the weighing equations in *Blystone* and *Boyde* to conclude that *Walton* did not address the equipoise question. See 814 P.2d at 846. In the end, however, the *Young* court appeared unsure of its construction of the United States Constitution and instead held that even

if its determination that the weighing equation violated the United States Constitution was incorrect, the weighing equation would violate the Colorado Constitution. 814 P.2d at 845-46.

This, then, is the sum total of authority for the proposition that a weighing equation which mandates death when aggravating and mitigating factors are in equipoise violates the Eighth Amendment: A Ninth Circuit case which the Ninth Circuit has recognized as having been abrogated by the United States Supreme Court; a federal district court case based entirely on that Ninth Circuit Court case; a New Jersey state case which predates any United States Supreme Court discussion of the issue and which is primarily based not on the United States Constitution but instead on New Jersey's "traditional concern for the rights of defendants charged with capital offenses," and a Colorado state case based primarily on the Colorado state constitution. This authority pales in comparison to that of a decision of the United States Supreme Court expressly authorizing such a weighing equation, see *Walton v. Arizona*, 497 U.S. 639, and the repeated assertions of the United States Supreme Court that no specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required. *Buchanan v. Angelone*, 522 U.S. 269, 276, 139 L. Ed. 2d 702, 118 S. Ct. 757 (1998). See *Walton*, 497 U.S. at 651-52; *Boyde v. California*, 494 U.S. at 377; *Blystone v. Pennsylvania*, 494 U.S. at 309.

There seems to be a general feeling among the majority that the weighing equation which mandates death in the highly unlikely event that the jury finds the aggravating and mitigating circumstances to be exactly equal in weight is somehow "unfair." While it is certainly within the province of this court to interpret the Eighth Amendment, we cannot do so in a vacuum. We cannot simply rely on our own inchoate feelings, but instead have a duty to examine, analyze, and apply the United States Supreme Court's jurisprudence on the matter. This is especially true in cases

such as the one before us where the majority of the court holds that a statute enacted by the legislature violates the Constitution on its face and is, therefore, invalid. We have held:

"The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the Constitution. . . . Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt." *State v. Groschang*, 272 Kan. 652, 668, 36 P.3d 231 (2001).

This is not to say that we should not strike down statutes which clearly infringe on the Constitution. However, when a court takes such a step it is imperative that a clearly articulated reason be given and that it be explained how that reason fits into the United States Supreme Court's jurisprudence on the issue. The cases examined compel the opposite conclusion from the majority's decision.

It is ironic that the majority appears more than ready to adopt my dissenting opinion in *Kleypas* on the question of whether the statute could be saved if it did in fact violate the Constitution. That part of the dissent was written in an unsuccessful effort to compel the *Kleypas* majority to squarely address the question of the statute's constitutionality and to articulate its reasoning as to why K.S.A. 21-4624(e) violates the Constitution. It is unfortunate that the majority rushes to give me perhaps too much credit for my dissenting opinion that the statute, if unconstitutional, is unconstitutional on its face, but completely disregards the overriding theme of my dissent, which is that the statute is not unconstitutional at all. See *Kleypas*, 272 Kan. at 1124 (Davis, J., dissenting).

I respectfully dissent from the majority opinion because I conclude that K.S.A. 21-4624(e), as passed by the Kansas Legislature in 1994, was and is today constitutional under the Eighth Amendment to the United States Constitution.

McFARLAND, C.J. and NUSS, J. join in the foregoing dissenting opinion.

NUSS, J., dissenting: I join Justice Davis for the reasons discussed in his dissenting opinion. I write a separate dissent primarily to elaborate upon one of his reasons: the controlling authority, over the instant case's issue of death at equipoise, of *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), *overruled on other grounds Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002).

Ever since the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972), many state legislatures have struggled to fashion death penalty statutes which the Supreme Court will not strike as unconstitutional. Their paths have been neither smooth nor straight because the Court's directions, and often its requirements, certainly have been less than clear and at least arguably less than consistent. Many legislatures could justifiably consider the constitutionality target in death penalty jurisprudence as a moving one. As described by one of the Supreme Court's own members, "[f]or state lawmakers, the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow." *Walton v. Arizona*, 497 U.S. at 668. (Scalia, J., concurring).

The Supreme Court did, however, bestow constitutional passing grades on state death penalty statutes in three cases in 1990: *Blystone v. Pennsylvania*, 494 U.S. 299, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990); *Boyde v. California*, 494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990); and *Walton*. As a result, if a state legislature can fashion a death penalty statute identical to any of those which were approved in these cases, then its statute should also receive a constitutional passing grade. The Kansas death penalty

statute, K.S.A. 21-4624, is functionally identical on the issue of death at equipoise to the Arizona death penalty statute approved in *Walton*. Accordingly, *Walton* controls. To demonstrate that *Walton* controls, I find it necessary to set forth below much of its specific language.

WALTON

There is no question that the issue of death at equipoise was squarely before the *Walton* Court. As Justice Davis' dissent explains, the Supreme Court granted certiorari to resolve the conflict between the Arizona Supreme Court, which held its state death penalty statute to be constitutional, and the United States Court of Appeals for the Ninth Circuit, which held the statute to be unconstitutional "for the reasons submitted by *Walton* in this case, see *Adamson v. Ricketts*, 865 F.2d 1011 (1988) (en banc)." 497 U.S. at 647.

Petitioner Walton's brief

To identify "the reasons submitted by Walton in this case," one must consider his brief:

Petitioner Walton began by clearly stating his second "Question Presented" on p. 1 of his brief as follows:

"Whether Arizona's capital sentencing statute violates the Eighth and Fourteenth Amendments by:

"a) requiring that death be imposed if the defendant fails to prove the existence of *mitigating circumstances sufficiently substantial to call for leniency*; and

"b) precluding the sentencer from considering mitigating circumstances unless the defendant has established their existence by a preponderance of the evidence?" (Emphasis added.)

Next, petitioner *Walton* articulated the effect of this italicized statutory language as interpreted by both the Arizona Supreme Court and the Ninth Circuit on p. 33 of his brief. In the section titled "The Statutory Presumption in Favor of Death," he argued:

"Not only must Arizona capital defendants establish that particular mitigating circumstances exist, but they must show that these circumstances are 'sufficiently substantial to call for leniency.' . . . This statutory language tells an Arizona sentencing judge who finds even a single aggravating factor, that death must be imposed, unless – as the Arizona Supreme Court put it in Petitioner's case – *there are 'out-weighing mitigating factors.*'" (citing *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 [1989]).

At p. 33, Walton then repeated the italicized statutory language's effect. He also clearly argued why he considered death at equipoise, which is connected to his argument regarding the statutory presumption in favor of death, to be violative of his constitutional rights:

"In *Adamson v. Ricketts*, [865 F.2d 1011 (9th Cir. 1988)], the Ninth Circuit succinctly described this system:

'Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, *but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s)* . . . The relevant clause in the statute – "sufficiently substantial to call for leniency" – thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance. 865 F.2d at 1041-2 (footnotes omitted)." (Emphasis added.)

Finally, petitioner *Walton* again clearly presented the issue of death at equipoise on pp. 36-37 of his brief. In the section titled "The Removal of Sentencing Discretion," he argued:

"The Arizona statute is explicitly mandatory: it provides that the sentencer 'shall' impose a death sentence whenever a single aggravating circumstance is found and the defendant fails to meet his statutory burdens of proof. . . .

. . . .

". . . While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because *in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence. . . . Adamson v. Ricketts, supra,* 865 F.2d at 1043 (footnotes omitted)." (Emphasis added.)

Plurality Opinion

Justice White, writing for the plurality, addressed the two subparts of petitioner Walton's second "Question Presented" in Sections III and IV of the opinion. See 497 U.S. at 649-652. In Section III, he expressly rejected Walton's contention "that the Arizona statute violates the Eighth and Fourteenth Amendments because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 649.

Then in Section IV of the plurality opinion, Justice White expressly rejected Walton's other contention that

"because [Arizona statute] § 13-703(E) provides that the court 'shall' impose the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency, the statute creates an unconstitutional presumption that death is the proper sentence." 497 U.S. at 651.

As support for rejecting Walton's latter argument, Justice White looked to two capital cases decided by the Court only 4 months earlier:

"Our recent decisions in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) and *Boyde v. California*, 494 U.S. 370 (1990), foreclose this submission. . . . We pointed out [in *Blystone*] that '[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant

mitigating evidence.'" 497 U.S. at 651-52 (citing *Blystone*, 494 U.S. at 307).

Justice White then proceeded to explain why *Boyde v. California* in particular supported the plurality's analysis and its rejection of Walton's argument:

"Similarly, *Boyde v. California*, *supra*, upheld a pattern jury instruction which stated that '[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.' See 494 U.S. at 374. . . . The Court specifically noted that 'there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and *States are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty.*'" *Id.*, at 377 (quoting *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion)). Walton's arguments in this case are no more persuasive than those made in *Blystone* and *Boyde*." (Emphasis added.) 497 U.S. at 652.

Justice Scalia joined White and the other three justices of this plurality, Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy, to form a majority which held Arizona's death penalty sentencing procedures were constitutional and affirmed Walton's death sentence which had been imposed under those procedures.

Dissenting Opinion

While Justice White did not use the word "equipoise" or expressly signal the concept, *i.e.*, specifically referencing "situations where the mitigating and aggravating circumstances are in balance," his four dissenting colleagues certainly acknowledged that the issue of death at equipoise was directly presented to them. Justice Blackmun, writing for himself and fellow dissenters Justices Brennan, Marshall, and Stevens, not only addressed this specific issue in Section B of the dissenting opinion at 497 U.S. at 686, but actually began his analysis with death at equipoise:

"*I also believe that the Constitution forbids the State of Arizona to place upon the capital defendant the burden of proving mitigating circumstances that are 'sufficiently substantial to call for leniency.*' Ariz. Rev. Stat. Ann. § 13-703(E) (1989). Once an aggravating circumstance has been established, the Arizona statute mandates that death is to be deemed the appropriate penalty unless the defendant proves otherwise. That statutory provision, in my view, establishes a 'presumption of death' in violation of the Eighth Amendment. [Citing, *inter alia*, *Adamson v. Ricketts*, 865 F.2d 1011, 1041 (9th Cir. 1988).]

"The Arizona Supreme Court repeatedly has indicated that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' *only if the mitigating factors 'outweigh' those in aggravation. . . . If the mitigating and aggravating circumstances are in equipoise, the statute requires that the trial judge impose capital punishment.* The assertion that a sentence of death may be imposed *in such a case* runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a 'determination that death is the appropriate punishment in a specific case.' [Citation omitted.]" (Emphasis added.) 497 U.S. at 686-87 (Blackmun, J., dissenting).

Not only did the four dissenters acknowledge that death at equipoise was directly presented to them, but more important, they also unequivocally interpreted Justice White's plurality opinion as having disposed of the issue. Specifically, the dissenters opined that the plurality's reliance on *Blystone v. Pennsylvania* and *Boyde v. California* was misplaced because those states' death penalty statutes were distinguishable from Arizona's on this very issue:

"The statutes upheld in those cases provided that the death penalty would be imposed 'only after a determination that *the aggravating circumstances outweigh the mitigating circumstances* present in the particular crime committed by the particular defendant, or that there are no such mitigating

circumstances.' *Blystone*, 494 U.S. at 305. *In neither Boyde nor Blystone did the challenged statute require a capital sentence when aggravating and mitigating factors are evenly balanced.* Those decisions simply do not speak to the issue posed by the Arizona statute: whether the State permissibly may place upon the capital defendant the burden of demonstrating that a sentence of death is *not* appropriate." (Emphasis added.) 497 U.S. at 687-88 (Blackmun, J., dissenting).

The dissenters' very next paragraph clearly continued their analysis of the issue of death at equipoise as follows:

"The plurality does not attempt to explain *why Arizona may require a capital sentence in a case where aggravating and mitigating circumstances are evenly balanced.* Indeed, the plurality does not even acknowledge that this is the dispositive question. Instead, it offers only a conclusory assertion: 'So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.'" 497 U.S. at 688 (Blackmun, J., dissenting).

The dissenters not only denounced the plurality's tacit approval of the concept that "in death, the tie goes to the State." They also worried that the plurality's lack of a "limiting principle" would allow states to place an even greater burden of proof upon the defendant fighting to avoid a sentence of death:

"One searches in vain for any hint of a limiting principle. May a State require that the death penalty be imposed whenever an aggravating factor is established and mitigating circumstances do not '*substantially* outweigh' those in aggravation? May a state statute provide that a death sentence is presumptively appropriate whenever an

aggravating circumstance is proved, and that the presumption can be rebutted only by a showing that mitigating circumstances are '*extraordinarily great*'? These formulations would appear to satisfy the plurality's test; viz., that the State is required to establish an aggravating circumstance, and no mitigating evidence is excluded from the sentencer's consideration." (Emphasis added.) 497 U.S. at 688 (Blackmun, J., dissenting).

The dissenters also observed that the plurality's approval of this concept in the Arizona death penalty statute "appears to rest upon an analogy between mitigating evidence in capital sentencing and affirmative defenses in noncapital cases." 497 U.S. at 689. The dissenters then left no doubt that they believed the plurality incorrectly permitted the tie to go to the State. They ended their analysis by "conclud[ing] that the Constitution bars Arizona from placing upon a capital defendant the burden of proving that mitigating circumstances are 'sufficiently substantial to call for leniency'" a phrase that the dissenters admitted was interpreted by the Arizona Supreme Court as requiring the defendant to prove his mitigating factors outweighed his aggravating factors. 497 U.S. at 690.

In my view, the four dissenters were correct in their interpretation of their colleagues' plurality opinion. The plurality conceivably required a capital defendant to prove more than his or her mitigating factors "outweighed" his or her aggravating factors; rather, *e.g.*, that they "*substantially* outweighed" them. Today, however, we need not try to determine the outer reaches of the plurality opinion regarding the defendant's burden of proof; rather, we need only acknowledge that death at equipoise is within that opinion's constitutional boundaries.

Controlling cases cited in Walton

That said, the part of the plurality opinion which most persuades me that death at equipoise is tacitly approved is as observed by the dissent Justice White's drawing an analogy

between mitigating evidence and affirmative defenses. In particular, he cited two of the Supreme Court's capital decisions which placed the burden on the defendant to prove self-defense or insanity or else be put to death: *Martin v. Ohio*, 480 U.S. 228, 94 L. Ed. 2d 267, 107 S. Ct. 1098 (1987); and *Leland v. Oregon*, 343 U.S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002 (1952). He additionally cited two non-capital murder cases: *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977); and *Rivera v. Delaware*, 429 U.S. 877, 50 L. Ed. 2d 160, 97 S. Ct. 226 (1976), which also placed the burden on the defendant to prove an affirmative defense. As Justice White concluded:

"*The basic principle of these cases controls the result in this case.* So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." (Emphasis added.) 497 U.S. at 650.

In one of the cited cases, *Leland v. Oregon*, 343 U.S. 790, the Court upheld a requirement that the defense of insanity be proved beyond a reasonable doubt by the defendant who had been sentenced to death. Next, in *Rivera v. Delaware*, 429 U.S. 877, though the court dismissed the appeal for want of a substantial federal question, the case had precedential value: a defendant convicted of second-degree murder who raised an insanity defense was required to prove his mental illness or defect by a preponderance of the evidence.

One year after *Rivera*, the Court stated in the second-degree murder case of *Patterson v. New York*, 432 U.S. at 207, that it was "unwilling to reconsider *Leland* and *Rivera*" and upheld a requirement that the affirmative defense of extreme emotional disturbance be proved by a preponderance of the evidence.

Finally, in *Martin v. Ohio*, 480 U.S. at 236, the Court observed: "We have had the opportunity to depart from *Leland v. Oregon*, . . . but have refused to do so," citing *Rivera v. Delaware*. Additionally: "These cases were important to the *Patterson* decision and they, along with *Patterson*, are authority for our decision today." 480 U.S. at 236. Based upon these precedents, the *Martin* Court upheld the Ohio practice of imposing on a capital defendant the burden of proving by a preponderance of the evidence that he or she was acting in self-defense when he or she committed a murder.

It is additionally persuasive to me that two of these four murder cases cited by Justice White in the *Walton* plurality, *Patterson v. New York* and *Martin v. Ohio*, were also authored by him. Moreover, *Martin* not only affirmed the *Leland* line of cases, but it also was written only 3 years before White wrote the plurality opinion in *Walton*. (Of the other two cases cited as authority for *Martin*'s holding, *Leland v. Oregon* predated all the members of the *Walton* Court, and *Rivera v. Delaware* had no author due to its dismissal on jurisdictional grounds.)

Accordingly, it is my opinion that Justice White knew exactly what these four cases stood for and therefore knew perhaps better than his colleagues exactly why these cases supported his opinion for the plurality in *Walton*. In short, since the Court had repeatedly approved requiring murder defendants, particularly two capital murder defendants, to prove their affirmative defenses by at least a preponderance of the evidence, it was entirely consistent for the Court to require defendant Walton to prove, essentially by a preponderance of the evidence, why he should not be sentenced to death, *i.e.*, to "prov[e] mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 650. Furthermore, the Court's reliance upon *Leland*, whose capital defendant was required to prove his affirmative defense by the even higher standard of beyond a reasonable doubt, clearly suggests the Court would approve some

capital defendant sentencing burdens even greater than those placed upon petitioner Walton.

The majority in the instant case, however, much like the majority in *Kleypas* whose reasoning it affirms in holding K.S.A. 21-4624(e) unconstitutional as written does not make any attempt to address these four important United States Supreme Court precedents upon which Justice White expressly relied. This omission is curious, since White's heavy reliance upon these cases as the key to the *Walton* opinion's holding could not have been stated any more clearly: "The basic principle of these cases controls the result in this case." 497 U.S. at 650. At best, the majority obliquely dismisses these four essential cases as "cases that predate *Walton*" which require analyzing "distinct statutory language" and as a result, "obviously, do not control." According to *Walton*, however, they expressly control the outcome there and should in the instant case as well.

CASE LAW INTERPRETATIONS OF WALTON

Walton clearly controls the issue of death at equipoise contained in the Kansas death penalty statute, K.S.A. 21-4624. Additionally persuasive, as Justice Davis points out in his dissent, are the interpretations of *Walton* by the two entities whose conflicting interpretations of the Arizona death penalty statute had to be resolved there: the Arizona Supreme Court and the Ninth Circuit Court of Appeals.

Since *Walton*, the Arizona Supreme Court has repeatedly interpreted its death penalty statute to require the defendant to prove mitigating factors which outweigh the aggravating factors in order to avoid a sentence of death. "On appeal, our task is independently to 'review the record to determine *whether any mitigating circumstances outweigh aggravating circumstances.*'" (Emphasis added.) *State v. Brewer*, 170 Ariz. 486, 504, 826 P.2d 783, cert. denied 506 U.S. 872 (1992). "We make this decision [on the death penalty sentence] after searching the entire record for error, examining the evidence establishing the presence or absence

of aggravating and mitigating circumstances, and determining *whether the latter circumstances outweigh the former when both are present.*" (Emphasis added.) *Brewer*, 170 Ariz. at 500. See *State v. Pandeli*, 200 Ariz. 365, 374, 26 P.3d 1136 (2001), *cert. granted and judgment rev'd by Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002); *State v. Hoskins*, 199 Ariz. 127, 147, 14 P.3d 997 (2000), *cert. denied* 534 U.S. 970 (2001); *State v. Van Adams*, 194 Ariz. 408, 422, 984 P.2d 16 (1999), *cert. denied* 528 U.S. 1172 (2000); *State v. Djerf*, 191 Ariz. 583, 595, 959 P.2d 1274, *cert. denied* 525 U.S. 1024 (1998); *State v. Ysea*, 191 Ariz. 372, 375, 956 P.2d 499 (1998); *State v. Rienhardt*, 190 Ariz. 579, 592-93, 951 P.2d 454 (1997), *cert. denied* 525 U.S. 838 (1998); *State v. Thornton*, 187 Ariz. 325, 335, 929 P.2d 676 (1996), *cert. denied* 520 U.S. 1217 (1997); *State v. Gulbrandson*, 184 Ariz. 46, 72, 906 P.2d 579 (1995), *cert. denied* 518 U.S. 1022 (1996); *State v. Greenway*, 170 Ariz. 155, 170, 823 P.2d 22 (1991); *State v. Lavers*, 168 Ariz. 376, 391, 814 P.2d 333, *cert. denied* 502 U.S. 926 (1991).

Moreover, after *Walton*, Arizona has executed capital defendants under the authority of its interpretation of that statute, with 22 executions since 1992. Three of those executions occurred after the Arizona Supreme Court affirmed the defendants' death penalty sentences (post-*Walton*), and the United States Supreme Court denied their petitions for writs of certiorari. See *State v. Miller*, 186 Ariz. 314, 921 P.2d 1151 (1996), *cert. denied* 519 U.S. 1152 (1997); *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994), *cert. denied* 516 U.S. 878 (1995); *State v. Brewer*, 170 Ariz. 486. One should be leery of reading too much into those denials, but one wonders: If the Supreme Court believed that Arizona was interpreting *Walton* in a way that violated a petitioner's constitutional rights, would not the Court have granted at least one petition to stop one of those three executions?

Additionally, the Arizona Supreme Court has interpreted *Walton* as rejecting the claim that its death penalty statute

contained a presumption of death, an argument closely connected to the death at equipoise argument. In *Gulbrandson*, the defendant argued that the Arizona statute was unconstitutional because "once the state has proven at least one aggravating circumstance, the statute places the burden on a defendant to prove sufficiently substantial mitigation to outweigh *the presumption of death.*" (Emphasis added.) *Gulbrandson*, 184 Ariz. at 72. The Arizona Supreme Court responded: "This argument has been rejected," citing *Walton*, 497 U.S. at 650. *Gulbrandson*, 184 Ariz. at 72. See *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566 (1992), *cert. denied* 509 U.S. 912 (1993); *State v. Brewer*, 170 Ariz. at 497; *State v. Greenway*, 170 Ariz. at 160.

Most tellingly to me, the Ninth Circuit, which had declared the Arizona death penalty statute unconstitutional, and upon which the *Walton* dissent heavily relied to opine that the statute establishes a presumption of death in violation of the Eighth Amendment, also interpreted *Walton* as rejecting this argument. In *Richmond v. Lewis*, 948 F.2d 1473, 1481 (9th Cir. 1992), the defendant had argued "that the Arizona statute creates an unconstitutional presumption that death is the proper sentence." The Ninth Circuit responded: "The Supreme Court's recent decision in *Walton v. Arizona* specifically addressed and rejected" this contention. *Richmond*, 948 F.2d at 1481. See *Campbell v. Wood*, 18 F.3d 662, 675 (9th Cir.), *cert. denied* 511 U.S. 1119 (1994); *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992), *cert. denied* 505 U.S. 1213 (1992); *Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir. 1990).

Furthermore, I observe that the Kansas Supreme Court also apparently interpreted *Walton* in this fashion in *State v. Spain*, 269 Kan. 54, 4 P.3d 621 (2000) just 1 year before *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001) when it stated:

"In *Walton*, five justices agreed the Arizona death penalty statute did not create an unconstitutional presumption in

favor of the death penalty. The statute at issue in *Walton* required imposition of the sentence of death if any aggravating circumstances were established and there were '"no mitigating circumstances sufficiently substantial"' to warrant leniency. 497 U.S. at 644 (quoting Ariz. Rev. Stat. Ann. § 13-703[E] [1989]). Although the language chosen by the Arizona legislature does not include the terms 'weigh' or 'outweigh,' what the statute prescribes is a weighing process that results in imposition of the death penalty if the mitigating circumstances are not of sufficient weight *to tip the balance toward leniency.*'" (Emphasis added.) 269 Kan. at 59.

I interpret our phrase "to tip the balance toward leniency" as requiring more mitigating circumstances than aggravating circumstances, *i.e.*, a tie goes to the State.

Finally, I observe, again with Justice Davis, that the Supreme Court of Idaho interpreted *Walton* the same way. In *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993), *cert. denied* 511 U.S. 1012 (1994), the defendant argued that part of Idaho's death penalty statute, like Marsh argues about part of Kansas' statute, was "unconstitutional because it requires a defendant to provide mitigating circumstances which outweigh any statutory aggravating circumstance found." 123 Idaho at 646-47. The challenged portion of the statute, Idaho Code § 19-2515(c)(1987), is very similar to K.S.A. 21-4624(e). It stated:

"Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. *Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.*" (Emphasis added.)

Compare K.S.A. 21-4624(e):

"If, by unanimous vote, the jury finds beyond a reasonable doubt that *one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist, and further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death*; otherwise, the defendant shall be sentenced as provided by law." (Emphasis added.)

The Idaho Supreme Court quickly dispatched Mr. Hoffman's constitutional argument because

"[t]his scheme was found to be constitutional in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). In that case, the Supreme Court held:

'So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency. 497 U.S. at 650, 110 S. Ct. at 3055.'

"Because the State was required to prove every element of the offense charged, including the statutory aggravating circumstances, the burden placed on Hoffman by operation of [Idaho Code] § 19-2515(c) did not violate his constitutional rights. *Walton v. Arizona, supra*." 123 Idaho at 647.

For the same reasons, Marsh's argument that K.S.A. 21-4624(e) is facially unconstitutional because it mandates death at equipoise should be quickly dispatched by our court.

In summary, outside of the Colorado Supreme Court's decision in *People v. Young*, 814 P.2d 834 (Colo. 1991) (which I agree with Justice Davis misreads the Arizona sentencing scheme and relies upon the Colorado Constitution), and *Hulsey v. Sargent*, 868 F. Supp. 1090 (E.D. Ark. 1993) (which does not mention *Walton* but relies

upon *Adamson*, which the Ninth Circuit admits was abrogated by *Walton*), I have been unable to find any other court since the *Walton* decision was released in 1990 that agrees with the position of the four justices in the majority in the instant case.

In conclusion, this court is bound by the United States Supreme Court's plurality holding in *Walton* until such time as that Court as warned by Justice Scalia in his concurring opinion in that case changes its mind. And *Walton* mandates that the death at equipoise concept contained in our death penalty statute, K.S.A. 21-4624, is constitutional.

McFARLAND, C.J., dissenting: I respectfully dissent. I agree with Justice Davis that the weighing equation contained in K.S.A. 21-4624(e) is constitutional as written. If we were writing on a clean slate, there would be no reason for me to further write in dissent; however, such is not the case. In *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), the majority opinion construed K.S.A. 21-4624(e) to be constitutional; I joined in the dissent of Justice Davis, as did Justice Abbott in a separate dissenting opinion, concluding the statute was constitutional as written. Thus, the *Kleypas* court unanimously upheld the constitutionality of K.S.A. 21-4624(e). Now, without any intervening change in substantive law, the majority opinion overrules *Kleypas*, not because the statute as construed is unconstitutional, but because the majority decides the *Kleypas* court exceeded its judicial authority in construing the statute. *Kleypas* was a 4 to 3 decision, consisting of a majority opinion and two written dissents. None of the three opinions took the position that the Kansas death penalty law must be struck down as constitutionally impermissible. The majority opinion upheld the law with an extremely minor judicial construction relative to equipoise, with the three dissenters upholding the law as written. In the case before us, another 4 to 3 decision, the majority concludes the death penalty is fatally flawed and rejects the majority's action in *Kleypas* which remedied the perceived equipoise flaw. There has been no change in

relevant constitutional law as expressed by the United States Supreme Court. The only change has been the composition of the Kansas Supreme Court occasioned by the retirements of Justices Larson, Six, Lockett, and Abbott. While fidelity to the doctrine of stare decisis is not an "inexorable command," we should be highly skeptical of reversing an earlier decision where nothing has changed except the composition of the court. See *Payne v. Tennessee*, 501 U.S. 808, 848, 115 L. Ed. 2d 720, 111 S. Ct. 2597, *reh. denied* 501 U.S. 1277 (1991) (Marshall J., dissenting).

The importance of the doctrine of stare decisis to our legal system has been often stated. The United States Supreme Court has recognized that, although not an "inexorable command," "[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. at 827. Stare decisis is:

"the means by which [the Court] ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion. [Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986).

See also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (stating that the "very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable"); *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 786-87, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) (White, J., dissenting) (stating that "[t]he rule of

stare decisis is essential if case-by-case judicial decisionmaking is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results").

We have similarly acknowledged the importance of stare decisis in our decisions, stating:

"once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by this court. . . . The application of stare decisis ensures stability and continuity demonstrating a continuing legitimacy of judicial review." *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 356, 789 P.2d 541 (1990), disapproved on other grounds, *Bair v. Peck*, 248 Kan. 824, 844, 811 P.2d 1176 (1991).

The majority opinion pays lip service to the concept of stare decisis, but hastily disregards it, stating:

"Stare decisis is designed to protect well-settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true in a situation like the one facing us here. *Kleypas*' application of the avoidance doctrine was not fully vetted. It is young and previously untested. Its rewriting of K.S.A. 21-4624(e) was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature." 278 Kan. at ___.

The *Kleypas* appeal was heard in December 2000. In the preceding 6 months, an unprecedented number of hours was spent by many court research attorneys preparing the lengthiest research memorandum I have ever seen. Fifty-one

issues relating to the validity of the conviction, sentence, and the constitutionality of the Kansas death penalty law as a whole were exhaustively considered by this court. At the end of a year of examination and deliberation, on December 28, 2001, we issued a 338-page ruling in which we concluded that the Kansas death penalty law, and specifically the weighing equation contained in K.S.A. 21-4624(e), was constitutional. Far more time was spent on this case by the justices, in general, and on the weighing issue, in particular, than any other case since I became a member of this court in 1977. The majority opinion brushes off the majority holding in *Kleypas*, stating the issue was not "fully vetted," cannot withstand "thoughtful critique," and is "clearly erroneous."

While it is true that stare decisis need not be an "inexorable command," any departure from it should be "informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." See *Planned Parenthood v. Casey*, 505 U.S. at 854. These considerations include: (1) whether the decision sought to be overturned has proven to be intolerable simply in defying practical "workability"; (2) whether the decision is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; (3) whether related principles of law have so far developed as to have left the rule established by the old decision no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or have come to be seen so differently, as to have robbed the rule established by the old decision of significant application or justification. 505 U.S. at 854-55.

There can be no serious contention that our decision in *Kleypas* construing K.S.A. 21-4624(e) in a constitutional manner has proven to be unworkable. From the beginning, the perceived constitutional problem with the weighing equation was slight: the weighing equation mandated death

rather than a life sentence in the extremely unlikely event that the jury determined the aggravating and mitigating circumstances to be in perfect balance. It is almost impossible to conceive as to how this event would come about in a real, as opposed to hypothetical, situation. In construing the statute so as to mandate life in that circumstance, we avoided the possibility that the entire Kansas death penalty law would be rendered invalid because of its application to an artificial situation that would almost certainly never arise. There is no real question that the statute, as construed by our decision in *Kleypas*, is constitutional.

This leads us to the question of whether our decision in *Kleypas* has been "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." See *Casey*, 505 U.S. at 854. "The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." 505 U.S. at 855. From the majority opinion, one might think that there could have been no reliance on our decision in *Kleypas*, inasmuch as the majority characterizes it as "young and previously untested." 278 Kan. at ___. However, this ignores the very real reliance that the legislature, courts, and the people of Kansas have placed on our decision.

Whatever one's opinion on the moral validity of the death penalty, the fact remains that in 1994, the legislature, acting on behalf of the people of Kansas, passed into law an act providing for the death penalty as a possible punishment for a narrow, clearly defined group of intentional and premeditated murders. See L. 1994, ch. 252. *State v. Kleypas* was the first case to consider the validity of that death penalty, and our decision was eagerly awaited by the people of Kansas as a test of whether the death penalty that the legislature had enacted would pass constitutional muster.

Through our opinion in *Kleypas*, we told the legislature, and by extension the people of Kansas, that the death penalty law it had enacted was constitutional as construed by this court. The legislature had the right to rely on our construction of the weighing equation in K.S.A. 21-4624(e), and concluded that no further action on its part was necessary in order for Kansas to have a constitutional death penalty. In reliance on our assurances that the Kansas death penalty law was constitutional as construed, a substantial number of death penalty proceedings have been tried in this state, resulting in the imposition of five death sentences. A report by the Legislative Division of Post Audit estimated the taxpayers' costs of the post-*Kleypas* cases included in its study in the millions of dollars. See Kansas Legislative Post Audit Committee Performance Audit Report, Costs Incurred for Death Penalty Cases, Appendix D (December 2003).

According to the majority, what this court should have done in *Kleypas* was declare the statute unconstitutional on its face. The majority therefore believes that is the appropriate remedy here. However, the situation is not the same here as it was in *Kleypas*. Where this court has not spoken on the constitutionality of a statute, all of those affected by it are on notice that its constitutionality has not been tested, and that it might be found wanting. However, where this court has addressed the precise statute involved, on the precise point articulated, and found the statute to be constitutional, persons should be entitled to rely on that decision, not see it overturned the very next time a case involving the same issue comes before this court. This reliance militates against haphazardly discarding our decision in *Kleypas*.

Certainly, there can be no argument that "related principles of law have so far developed as to have left the old rule" established in *Kleypas* "no more than a remnant of abandoned doctrine." See *Casey*, 505 U.S. at 855. Our decision in *Kleypas* is a mere 3 years old, and nothing this court has said in the interim has evidenced our intention to abandon its underlying principles. Similarly, there has been

nothing in the jurisprudence of the United States Supreme Court during that time to show that our decision in *Kleypas* was incorrect.

Nor have "facts . . . so changed, or come to be seen so differently, as to have robbed the old rule [established by the *Kleypas* decision] of significant application or justification." See *Planned Parenthood v. Casey*, 505 U.S. at 855. There has been no significant change in the factual underpinnings of our *Kleypas* decision, and no change in facts that would cause its central holding to be rendered obsolete.

The majority's decision today, by the barest of margins, discards our 3-year old decision in *Kleypas*, not because that decision has become unworkable, or the laws or facts underpinning it have changed, or a United States Supreme Court decision mandates it, but simply because this new majority has the power to do so. And to what end? This is not a situation where the continuation of an allegedly erroneous decision has the potential to work great hardship on the rights of individuals. Our construction of the statute in *Kleypas* does not adversely affect the rights of those charged with capital murder; rather, it actually provides greater protection. There is no question that the weighing equation in K.S.A. 21-4624(e), as construed by our decision in *Kleypas*, is constitutional. Thus, there is now no possibility that any defendant will be sentenced to death where the aggravating and mitigating circumstances are in equipoise. This court's decision in *Kleypas* creates no prejudice to any defendant. Nevertheless, the majority's decision herein has the anomalous consequence that death-sentence defendants: Reginald D. Carr, Jonathan D. Carr, John Robinson, Sr., Douglas Belt, and Michael L. Marsh, II (defendant herein), will have their death sentences swept away, despite the fact that the equipoise factor which so concerns the majority was not present. The death penalty proceedings in each of these five cases, except *Marsh*, were tried post-*Kleypas* and, thus, each of the juries was instructed that, pursuant to our decision in *Kleypas*, the aggravating factors were required to

outweigh the mitigating factors for death to be imposed, and each jury so found.

The majority reasons that our decision in *Kleypas* must be overruled in order to avoid encroaching upon the power of the legislature. One might assume that, had the legislature viewed our decision as an encroachment, there might have been an outcry at the time the decision was handed down. Yet, nothing of the sort occurred.

It is ironic that the majority, in its professed desire to avoid usurping the power of the legislature, does so by frustrating the legislature's clear intent to pass a constitutional death penalty. There is no indication that the legislature, in passing the Kansas death penalty law, was particularly concerned that the sentence be death in the event that the aggravating and mitigating circumstances were exactly equal. As Justice Davis has shown in his dissent, such an "equipoise" event is extremely unlikely to arise outside the realm of hypothetical situations that are more the province of law professors than judges. By invalidating the Kansas death penalty law on the basis of its application to a technical event that is almost certain never to arise in the real world, the majority opinion thwarts the intention of the legislature, ostensibly, in order to pay tribute to it.

The only currency and legitimacy this court possesses is the confidence of the public that we will decide cases based on the consistent application of the law, rather than on the proclivities of individual court members. Attorneys, trial courts, and the public have the right to know that a point of law, once settled, will remain the settled law of the state and not be overturned every time the composition of the court changes. Our fidelity to the doctrine of stare decisis need not be absolute, but we should not abandon our prior decisions without a compelling reason to do so. See *United States v. International Business Machines Corp.*, 517 U.S. 843, 856, 135 L. Ed. 2d 124, 116 S. Ct. 1793 (1996). No compelling

reason has been shown herein and, as a result, I believe the majority opinion is a breach of that fidelity.

I joined the dissent of Justice Davis in *Kleypas* because I concluded as he did that the weighing equation was constitutional as enacted. I still so believe and am joining his dissent herein on that issue. In *Kleypas*, in a 4 to 3 decision, all seven justices agreed the Kansas death penalty law was constitutional, either as construed in a very minor respect (majority) or as written (dissent). To now strike down the Kansas death penalty law is, in my opinion, wholly inappropriate and unjustified, and I dissent therefrom.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

***** FLAT-FILE-COPY *****

CASE NO. 98-81135-5

STATE OF KANSAS,
Appellee,

v.

MICHAEL LEE MARSH, II,
Appellant.

You are hereby notified of the following action taken by the Court:

Motion for Rehearing or Modification by State of Kansas.

Considered by the Court and denied. Response noted.

DATE: 02/02/2005.

Carol G. Green
Clerk

Copies to Counsel

SUPREME COURT OF KANSAS.

STATE OF KANSAS,
Appellee,
v.
GARY W. KLEYPAS,
Appellant.

No. 80,920.

Decided December 28, 2001

SYLLABUS BY THE COURT

1. Evidence of a defendant's mental disease or defect excluding criminal responsibility is not admissible at a trial unless the defendant serves upon the prosecuting attorney and files with the court a written notice of such defendant's intention to assert the defense that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. K.S.A. 22-3219. However, insanity and voluntary intoxication are two separate defenses. No notice of an insanity defense is required where the evidence points only to a temporary mental state negating specific intent caused by the voluntary consumption of alcohol.

2. Factors to be considered in determining whether a confession is voluntary include: (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused on request to communicate with the outside world; (4) the accused's age, intellect, and background; and (5) the fairness of the officers in conducting the investigation.

3. Voluntariness of a confession is determined from the totality of the circumstances and where a trial court conducts a full prehearing on the admissibility of extrajudicial statements by the accused, determines the statements were

freely and voluntarily given, and admits the statements into evidence at trial, appellate courts do not attempt to reweigh the evidence and accept that determination if supported by substantial competent evidence.

4. When a suspect makes a statement which may be ambiguous as to whether the suspect is asserting a right to remain silent, the interrogator may, but is not required to, ask questions to clarify and in any event may continue the questioning.

5. When the facts material to a decision of the court on a motion to suppress evidence are not in dispute, the question of whether to suppress becomes a question of law. An appellate court's scope of review on questions of law is unlimited.

6. It is constitutionally required that a search warrant shall particularly describe the place to be searched and items to be seized. General or blanket warrants which give the executing officers a roving commission to search where they choose are forbidden. The purpose of the constitutional requirement that search warrants particularly describe the place to be searched and the person or property to be seized is to prevent general searches and the seizure of items at the discretion of the officer executing the warrant.

7. Where the affidavit supporting a search warrant contains a particularized description of the items to be seized; the affiant and the affidavit are both present at the scene of the execution of the search warrant, even if the affiant is not the person executing the search warrant; and the officers executing the search warrant are briefed as to the items listed in the affidavit, the description in the affidavit cures a deficiency in the description of the search warrant.

8. When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant, thereby requiring suppression of all evidence seized under the warrant.

However, an unlawful seizure of items outside the scope of a warrant does not alone render the whole search invalid and require suppression of all evidence seized, including that lawfully taken pursuant to the warrant. Unless there was a flagrant disregard for the terms of the warrant, only the improperly seized evidence, rather than all the evidence, need be suppressed.

9. Where a defendant attacks the affidavit supporting an arrest warrant based on the omission of material information, he or she must show: (1) The omission was deliberate and (2) the omission was material. An omission is material if the original affidavit together with the previously omitted information would not support a finding of probable cause. Probable cause exists if, under the totality of circumstances as set forth in the affidavit, a fair probability exists that a crime has been committed or is being committed and that the defendant has committed it.

10. Unless a criminal defendant can show bad faith on the part of the State, the State's failure to preserve potentially useful evidence does not constitute a denial of due process of law. The question of whether the State acted in bad faith is a question of fact.

11. A criminal defendant has a right to an instruction on all lesser included offenses supported by the evidence as long as (1) the evidence, when viewed in the light most favorable to the defendant's theory, would justify a jury verdict in accord with that theory and (2) the evidence at trial does not exclude a theory of guilt on the lesser offense. An instruction on a lesser included offense is not proper if from the evidence the jury could not reasonably convict the defendant of the lesser offense.

12. The terms "in the commission of," "attempt to commit," and "flight from," as used in the felony-murder statute, are temporal requirements delineating when a killing may occur and still be part of the underlying felony.

13. In order to require an instruction on felony murder based on the theory that the killing occurred during the "flight from" an inherently dangerous felony, there must be evidence that the killing occurred during flight from the scene of the felony.

14. No party may assign as error the giving or failure to give an instruction unless he or she objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he or she objects and the grounds of his or her objection, unless the instruction or failure to give the instruction is clearly erroneous. Instructions are clearly erroneous only if the reviewing court is firmly convinced that there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred.

15. In a prosecution for an attempt to commit a felony, there is no requirement that a jury be instructed as to a specific overt act the defendant is alleged to have committed.

16. When reviewing challenges to jury instructions, the instructions are to be considered together and read as a whole without isolating any one instruction. If the instructions properly and fairly state the law as applied to the facts in the case, and if the jury could not reasonably have been misled by them, the instructions do not constitute reversible error although they may be in some small way erroneous.

17. The interpretation of a statute is a question of law, and an appellate court's review is unlimited. The fundamental rule of statutory construction guiding an appellate court's determination is that the intent of the legislature governs when that intent can be ascertained from the statute. When a statute is plain and unambiguous, the appellate court must give it the effect intended by the legislature rather than determine what the law should or should not be.

18. The phrase "or any attempt thereof" modifies all the offenses contained in K.S.A. 21-3439(a)(4) and makes the intentional and premeditated killing of the victim during the

commission of or attempt to commit, or subsequent to the commission of or the attempt to commit, the offenses enumerated.

19. Reversible error normally cannot be predicated upon a complaint of misconduct by the prosecutor during closing argument where no contemporaneous objection is lodged. However, if the prosecutor's statements rise to the level of violating a defendant's right to a fair trial and deny a defendant his or her Fourteenth Amendment right to due process, reversible error occurs despite the lack of a contemporaneous objection.

20. An appellate court's analysis of the effect of a prosecutor's allegedly improper remarks in closing argument is a two-step process: First, the appellate court must determine whether the remarks were outside the considerable latitude the prosecutor is allowed in discussing the evidence. Second, the appellate court must determine whether the remarks constituted plain error; that is, whether they were so gross and flagrant as to prejudice the jury against the accused and deny him or her a fair trial. In order to find that the remarks were not so gross or flagrant, the appellate court must be able to find that when viewed in light of the record as a whole, the error had little, if any, likelihood of changing the result of the trial.

21. Factors relevant in determining whether a new trial should be granted for prosecutorial misconduct include: (1) whether the misconduct is so gross and flagrant as to deny the accused a fair trial; (2) whether the remarks show ill will on the part of the prosecutor, and (3) whether the evidence against the accused is of such a direct and overwhelming nature that it can be said that the prejudicial remarks of the prosecutor were likely to have little weight in the minds of the jurors.

22. A prosecutor has a duty to refrain from making improper, misleading, inflammatory, or irrelevant statements to the jury. This duty is heightened in capital cases.

23. Opening statements by counsel in criminal prosecutions are not evidence. They are given for the purposes of assisting the jury in understanding what each side expects its evidence at trial will establish and to advise the jury what questions will be presented for its decision. Prosecuting and defense attorneys are permitted reasonable latitude in stating to the jury the facts they propose to prove.

24. In closing argument, the prosecutor may draw reasonable inferences from the evidence but may not comment upon facts outside the evidence.

25. A juror's mental process in reaching the verdict or factors that influence the mental process cannot be inquired into for purposes of impeaching a verdict. Evidence may be received, however, as to conditions and occurrences either within or outside the jury room having a material bearing on the validity of the verdict.

26. The granting of a new trial or the recalling of a juror to inquire into alleged misconduct is a decision within the sound discretion of the trial court. Discretion is abused only where no reasonable person would agree with the actions of the trial court. Where a reasonable person would agree, an appellate court will not disturb the trial court's decision.

27. Where claims of juror misconduct directly implicate the jury's mental processes and cannot be readily verified, a trial court does not abuse its discretion by refusing to recall the jury. Where juror affidavits set forth allegations of misconduct, the truth of which can be verified, the trial court may allow inquiry and order a new trial if in its discretion juror misconduct requires a new trial.

28. The Fourteenth Amendment's guaranty of due process does not require that a prospective juror be totally ignorant of the facts and issues involved in the case. Mere existence on his or her part of a preconceived notion as to the guilt or innocence of the accused is, without more, insufficient to rebut the presumption of impartiality where the juror can lay

aside such impression or opinion and render a verdict based on the evidence presented in court.

29. The general rule is that a criminal statute must be strictly construed in favor of the accused and any reasonable doubt about its meaning is decided in favor of anyone subjected to the statute. However, this rule is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent.

30. Under K.S.A. 21-4624, the State is only required to provide notice that it intends to seek the death penalty upon conviction for capital murder. The State may at that time provide notice of the aggravating circumstances on which it will rely, but the State is not required to do so as long as it provides such notice within a reasonable time prior to trial. K.S.A. 21-4624 does not require the State to list the evidence it will present with regard to the aggravating circumstances as long as the State has made this evidence known to the defense prior to the sentencing proceeding.

31. Kansas law does not require a trial court to make a pretrial determination of whether there is sufficient evidence of aggravating circumstances to justify a separate penalty phase trial.

32. A criminal defendant is incompetent to stand trial when, because of a mental illness or defect, the defendant is unable to understand the nature and purpose of the proceedings against him or her or where he or she is unable to make or assist in making a defense. On appeal, a reviewing court's inquiry regarding the decision of a district court that a defendant is competent to stand trial is whether the trial court abused its discretion.

33. A party who raises the issue of a defendant's competency to stand trial has the burden of going forward with the evidence which will be measured by the preponderance of the evidence standard.

34. Amnesia alone does not provide a basis for declaring a defendant incompetent to stand trial. Amnesia is a factor to

be considered in determining whether a defendant is able to meet the test of competency to stand trial.

35. Challenges for cause are matters left to the sound discretion of the trial court which is in a better position to view the demeanor of prospective jurors during voir dire. A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is clearly erroneous or amounts to an abuse of discretion.

36. A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venirepersons for cause because they voiced general objections to the death penalty or expressed conscientious or religious scruples against the death penalty. However, a prospective juror may be excluded for cause because of his or her views on capital punishment where the juror's views would prevent or substantially impair the juror's ability to follow the instructions of the trial court.

37. K.S.A. 21-4624(b) does not provide for a separate jury in the penalty phase of a capital-murder case. Instead, the same jury that heard the guilt phase also hears the penalty phase. However, a defendant may voir dire the jury prior to the penalty phase in order to remove potentially prejudiced jurors for cause.

38. Allegations of judicial misconduct during trial must be decided on the particular facts and circumstances surrounding such alleged misconduct. In order to warrant or require the granting of a new trial, it must affirmatively appear that the conduct was of such nature that it prejudiced the substantial rights of the complaining party. A mere possibility of prejudice from a remark of the trial court is not sufficient to overturn a verdict or judgment. If a proper and reasonable construction will render the remark unobjectionable, an appellate court generally adopts that construction and concludes the remark is not prejudicial.

39. In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court set a

framework designed to prevent the discriminatory exclusion of prospective jurors on the basis of race. Under the *Batson* framework, the defendant must first make a prima facie case showing that the prosecutor has exercised peremptory challenges on the basis of race. Once such a showing has been made, the burden shifts to the prosecutor to articulate a race-neutral reason for striking the prospective juror. The trial court must then determine whether the defendant has carried the burden of proving purposeful discrimination.

40. Parties may exercise their peremptory challenges to remove from the venire any group of persons. Appellate court review is a rational basis review under the Equal Protection Clause of the United States Constitution.

41. It is not improper for the State to use a peremptory strike to remove a prospective juror on the basis of his or her aversion to imposing the death penalty.

42. Even if trial errors are harmless when considered individually, cumulative trial errors may be so great as to require reversal of a defendant's conviction. The test is whether under the totality of circumstances cumulative error substantially prejudiced the defendant and denied him or her a fair trial.

43. In a capital case, the fundamental respect for humanity underlying the Eighth Amendment to the United States Constitution requires that the sentencer be able to consider the character and record of the individual defendant and the circumstances of the particular offenses as a constitutional, indispensable part of the process of imposing the death penalty.

44. In a capital case, the defendant must not only be allowed to present mitigating circumstances, but the sentencer must also be able to consider and give effect to the mitigating circumstances in imposing the death sentence.

45. K.S.A. 21-4624(e) is not unconstitutional on its face, but it impermissibly mandates the death penalty where the jury finds that the mitigating and aggravating circumstances are

in equipoise. As such, it denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstances that it finds exist.

46. This court not only has the authority but also the duty to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute. To accomplish this purpose, the court may read the necessary judicial requirements into the statute.

47. The legislative intent in passing K.S.A. 21-4624 was to provide for a death sentencing scheme by which a sentence of death is imposed in a constitutional manner.

48. K.S.A. 21-4624(e) is construed to provide that if a jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exist, and further, that such aggravating circumstance or circumstances outweigh the mitigating circumstances found to exist, the defendant shall be sentenced to death. So construed, the intent of the legislature is carried out and K.S.A. 21-4624(e) does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

49. Our holding requires that this case be remanded for resentencing to allow a jury to reconsider the imposition of the death penalty.

50. In a capital case, the standard of review on appeal as to the sufficiency of evidence regarding an aggravating circumstance is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the existence of the aggravating circumstance beyond a reasonable doubt.

51. In order for the avoid arrest aggravating factor found in K.S.A. 21-4625(5) to apply, the State must prove that a motive – not the dominant or only motive – for the murder was to avoid prosecution.

52. To pass constitutional scrutiny, an aggravating circumstance must channel the discretion of the sentencer with clear and objective standards which provide specific guidance and make possible a rational review of the process of sentencing a defendant to death. An aggravating circumstance must not apply to every defendant convicted of murder but only to a subclass of that larger group. If the sentencer could fairly conclude that an aggravating circumstance applies to every defendant convicted of murder, the circumstance is unconstitutionally vague or overbroad.

53. When the jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process; it is insufficient to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

54. In order to find that a murder was committed in an especially heinous, atrocious, or cruel manner so as to satisfy the aggravating circumstance contained in K.S.A. 21-4625(6), the jury must find that the perpetrator inflicted mental anguish or physical abuse before the victim's death.

55. The Kansas definition of "heinous, atrocious or cruel" narrows the class of death eligible defendants consistent with the requirements of the Eighth and Fourteenth Amendments to the United States Constitution.

56. Neither the United States Constitution, the Kansas Constitution, nor Kansas law require a proportionality analysis of a defendant's death sentence.

57. Evidence presented at a capital sentencing proceeding must be relevant to the sentence and have probative value. Evidence secured in violation of the Constitution is not admissible. The State may only introduce evidence of aggravating circumstances which were disclosed to the defendant prior to sentencing, and the defendant must be given a fair opportunity to rebut hearsay statements.

58. A capital defendant may waive trial by jury which also waives sentencing by jury. However, where a defendant pleads guilty, thus waving trial and sentencing by a jury, he or she is still subject to imposition of the death penalty by the court.

59. Section 1 of the Kansas Constitution Bill of Rights and the cruel and unusual punishment clause found in § 9 of the Kansas Constitution Bill of Rights do not prohibit capital punishment per se.

60. In a capital case, written findings with regard to mitigating circumstances are not mandated by either Kansas law or the United States Constitution.

61. No customary international law or international treaty prohibits the State of Kansas from invoking the death penalty as a punishment for certain crimes.

62. K.S.A. 21-4624(b) does not establish a specific time within which the State's motion for a separate sentencing proceeding must be made; rather, the motion requirement is intended to secure the orderly and systematic dispatch of the public business. The State's delay in filing a motion for a separate sentencing proceeding does not invalidate the resulting proceeding, absent prejudice to the defendant.

63. The sentencing proceeding under the Kansas capital-murder scheme has but one purpose: to determine whether the defendant should be sentenced to death. Only two options are contemplated: Either the jury will unanimously agree beyond a reasonable doubt that one or more aggravating circumstances exist and further that such aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, in which case it will sentence the defendant to death; or the jury will fail to so unanimously find, in which case the defendant will not be sentenced to death.

64. The Kansas death penalty scheme requires the jury to weigh the aggravating factors against the mitigating factors. The State should be permitted to introduce evidence

regarding the underlying circumstances of the prior crime to satisfy the aggravating circumstance contained in K.S.A. 21-4625(1), notwithstanding the defendant's offer to stipulate to the existence of the aggravating circumstance. However, courts must be careful to exercise their discretion in admitting such evidence in order to protect the rights of the defendant.

65. While evidence that a defendant has been well behaved in prison, and in the future will be similarly well behaved, is a mitigating circumstance, evidence of prison conditions does not bear on the defendant's character, prior record, or the circumstances of the offense. Therefore, it is not mitigating and, thus, generally not admissible at the penalty phase. However, such evidence may be admissible to rebut prosecutorial assertions regarding prison conditions.

66. The sentencing jury may not refuse to consider, as a matter of law, relevant mitigating evidence. However, this does not mean that the jury may not find some circumstances not to be mitigating but, rather, only precludes the jury from determining that it may not legally consider certain mitigating circumstances and evidence. The jury is free to determine for itself what circumstances it chooses to be mitigating and whether the evidence of those circumstances is sufficient.

67. In the absence of a request, the trial court has no duty to inform the jury in a capital murder case of the term of imprisonment to which a defendant would be sentenced if death were not imposed. Where such an instruction is requested, the trial court must provide the jury with the alternative number of years that a defendant would be required to serve in prison if not sentenced to death. Additionally, where a defendant has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be

served consecutively or concurrently to each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court.

68. The heinous, atrocious, or cruel manner aggravating circumstance in K.S.A. 21- 4625 is not targeted toward the motive for the killing but, rather, focuses on the manner in which the killing was committed. The heinous, atrocious, or cruel manner aggravating circumstance is not inconsistent with the avoiding arrest aggravating factor.

69. The standard of review and the ultimate question that must be answered with regard to whether prosecutorial misconduct in the penalty phase of a capital trial was harmless is whether the court is able to find beyond a reasonable doubt that the prosecutorial misconduct, viewed in the light of the record as a whole, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances. In this determination, the overwhelming nature of the evidence is a factor to be considered, although its impact is limited. The question for the reviewing court is not what effect the constitutional error might generally be expected to have upon a reasonable jury but, rather, what effect it had upon the actual verdict in the case at hand.

70. In order for an appellate court to determine that the evidence is so overwhelming as to make any prosecutorial misconduct harmless, the court must assume that all of the mitigating circumstances claimed by the defendant exist, and it must be able to say that, even so, the weight of the mitigators could not have outweighed that of the aggravating circumstances.

71. Even if instances of prosecutorial misconduct which occur during the penalty phase of a capital trial are harmless error in and of themselves, their cumulative effect must be analyzed. The issue is whether the sum total effect of the misconduct, viewed in light of the record as a whole, had little, if any likelihood of changing the jury's ultimate

conclusion regarding the weight of the aggravating and mitigating circumstances.

72. Counsel may not make assertions of fact in the form of questions to a witness absent a good faith basis for believing the asserted matters to be true.

73. While the State must be ready to establish the good faith basis for its questions, its responsibility to do so is triggered by an objection which asks it to do so, and where there is no such objection, the duty does not exist.

74. In the penalty phase of a capital proceeding, where a defendant presents evidence of a mitigating circumstance, the prosecution is permitted to cross-examine defense witnesses as to relevant facts and to introduce relevant evidence in order to rebut the existence of the mitigating circumstance.

75. When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly. Although a trial judge is required to give such an instruction where applicable on request of one of the parties, the failure to do so when not requested is not error unless such failure is clearly erroneous.

76. A conviction based on perjured or false evidence is a violation of due process even in cases where the perjury or false evidence was not induced by the prosecution.

77. The Fifth Amendment to the United States Constitution, as well as § 10 of the Kansas Constitution Bill of Rights, protects the right of a defendant to exercise his or her privilege not to testify and forbids comment by the prosecution on the defendant's silence. A prosecutor commits error when the language used was manifestly intended or was of such a character that the jury would necessarily take it to be a comment on the failure of the accused to testify.

78. It is a violation of a defendant's Fifth Amendment rights for a prosecutor to comment on evidence of the defendant's courtroom behavior where the defendant has exercised his or her right not to testify.

79. Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability, or blame, or which justify a sentence of less than death, even though they do not justify or excuse the offense. It is proper for a prosecutor to argue that certain circumstances not be considered as mitigating circumstances. However, it is improper for a prosecutor to argue that certain circumstances should not be considered as mitigating circumstances because they do not excuse or justify the crime.

80. A prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

81. It is improper for a prosecutor to state facts in closing argument that are not in evidence or are contrary to the evidence.

82. It is proper for the prosecutor to argue that the defendant is not deserving of the jury's mercy because of the defendant's actions, as long as the prosecutor does not improperly state the law by arguing to the jury that it is prohibited from granting mercy to the defendant because the defendant showed none to the victim.

83. A prosecutor is allowed to introduce relevant evidence to show the victim's mental anguish and, further, to make arguments and inferences from the evidence that the victim suffered such mental anguish, where relevant. However, prosecutorial comments referring to what the victim was thinking are improper because they ask the jury to speculate on facts not in evidence. It is improper for a prosecutor to create an "imaginary script" in order to create and arouse the prejudice and passion of the sentencing jury.

84. During closing argument, a prosecutor may refer to and use photographs of victims admitted at trial as long as the purpose is not to unduly inflame the passions of the jury and prejudice it towards the defendant.

85. The future dangerousness of the defendant is not a statutory aggravating circumstance and it is improper for a prosecutor to make references to a defendant's potential for future dangerousness.

86. It is improper for a prosecutor to argue to the jury that it does not have the responsibility to determine the defendant's sentence.

87. It is proper for a prosecutor to argue that the defendant himself or herself should be held responsible for his or her actions.

88. It is not proper for a prosecutor to argue that a defendant should be punished for his or her prior crime. However, where the fact that the defendant was previously convicted of a felony in which the defendant inflicted death on another is an aggravating circumstance, it is proper for the prosecutor to argue about the relative weight of that aggravating circumstance as compared to the defendant's mitigating circumstances.

Jessica R. Kunen, chief appellate defender, and Steven R. Zinn, deputy appellate defender, argued the cause, and Rebecca E. Woodman, Reid T. Nelson, and Kirk C. Redmond, assistant appellate defenders, and David Gottlieb, of Kansas Defender Project, of Lawrence, were with them on the briefs for appellant.

Carla J. Stovall, attorney general, argued the cause, and David B. Debenham and Julene L. Miller, deputy attorneys general; Alexander M. Walczak, Athena E. Andaya, John K. Bork, and Jared S. Maag, assistant attorneys general; and Stephen R. McAllister, special assistant attorney general, were with them on the briefs for appellee.

Stephen P. Garvey, John H. Blume III, and Sheri Lynn Johnson, of Ithaca, New York, were on the brief for amicus curiae Cornell Death Penalty Project.

Andrea D. Lyon, of Ann Arbor, Michigan, was on the brief for amicus curiae National Association of Criminal Defense Lawyers.

Paige A. Nichols, of Lawrence, was on the brief for amicus curiae Kansas Association of Criminal Defense Lawyers.

Kent S. Scheidegger, of Sacramento, California, was on the brief for amicus curiae Criminal Justice Legal Foundation.

The opinion of the court was delivered by PER CURIAM.

* * * *

Issue 23. Constitutionality of Weighing Equation

Kleypas argues that the weighing equation set forth in K.S.A. 21-4624(e) violates the state and federal constitutional prohibitions against cruel and unusual punishment and the guarantees of due process because it mandates a sentence of death when aggravating and mitigating circumstances are found to be in equal balance. Under the facts of this case, we agree that the weighing equation violates the Eighth and Fourteenth Amendments to the United States Constitution.

K.S.A. 21-4624(e) provides:

> "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law."

Kleypas argues that mandating death when aggravating and mitigating circumstances are found to be in equal balance produces unrealistic results, creates a presumption of death,

shifts the burden of proof to the defendant to prevent imposition of a death sentence, and precludes the jury from giving effect to the mitigating evidence.

The constitutionality of a statute is a question of law over which this court has de novo review. *State v. Ponce*, 258 Kan. 708, 709, 907 P.2d 876 (1995). We must decide if the weighing equation in the statute violates the Eighth Amendment to the United States Constitution because it mandates a sentence of death if the jury finds that the mitigating and aggravating circumstances are in equipoise. Equipoise is a result of mandating the death sentence if the mitigating circumstances do not outweigh the aggravating circumstances.

Kleypas contends that the Kansas weighing formula is unique among the 38 death penalty states by mandating a death sentence when there is equipoise. Although no other state statute has identical language to our statute, five states have similar language resulting in the same weighing equation.

Kleypas first raised the equipoise issue by motion filed in the district court. The district court denied the motion, finding that the United States Supreme Court approved such a statutory scheme in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The district court's reliance on *Proffitt* is misplaced. In *Proffitt*, the Supreme Court noted:

> "The jury found the defendant guilty as charged. Subsequently, as provided by Florida law, a separate hearing was held to determine whether the petitioner should be sentenced to death or to life imprisonment. Under the state law that decision turned on whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist." 428 U.S. at 245-46, 96 S.Ct. 2960.

Justice White in concurring also noted: "Under Florida law, the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors." 428 U.S. at 260, 96 S.Ct. 2960 (White, J., concurring). The Florida weighing equation is not the same as ours. Under the Florida weighing equation, a death sentence cannot be imposed if there is a finding that equipoise exists. *Proffitt* does not support the district court's decision in the present case. In addition, the Florida jury returns an advisory verdict, and the judge has the ultimate responsibility for sentencing the defendant.

Kleypas cites three cases in support of his constitutional challenge to K.S.A. 21-4624(e). The first is *State v. Biegenwald,* 106 N.J. 13, 524 A.2d 130 (1987). The New Jersey statute in effect at the time of the crime stated in part: " 'If the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death.' " 106 N.J. at 58, 524 A.2d 130. The court considered the weighing equation *sua sponte,* finding it constituted plain error. The court stated:

> "The error concerns the jury's function in balancing aggravating factors against mitigating factors, a function that leads directly to its ultimate life or death decision. Its effect was to allow a death sentence without a finding that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. We hold that such a finding was required by the Act at the time of defendant's trial as a matter of fundamental fairness and that its absence mandates reversal and retrial of the penalty decision. Legislative policy also mandates this result, as indicated by the 1985 amendments to the Act; those amendments, furthermore, provide an independent basis for this result." 106 N.J. at 53, 524 A.2d 130.

The court made it clear that the former rather than the latter was ultimately the basis for its decision: "If anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors *outweigh* mitigating factors, and this balance must be found beyond a reasonable doubt." 106 N.J. at 62, 524 A.2d 130.

In *People v. Young,* 814 P.2d 834 (Colo.1991), the Colorado Supreme Court considered the constitutionality of their statutory weighing equation which required the jury return a sentence of death if the jury found insufficient mitigating factors to outweigh the statutory aggravating factors. The court noted that under this formula a death sentence was mandated if the "mitigators and aggravators are equally balanced." 814 P.2d at 839. The court concluded that the statute violated the state constitution provision against cruel and unusual punishment, stating:

> "The result of a decision that the relevant considerations for and against imposition of the death penalty in a particular case are in equipoise is that the jury *cannot* determine with reliability and certainty that the death sentence is appropriate under the standards established by the legislature. A statute that requires a death penalty to be imposed in such circumstances without the necessity for further deliberations, as does section 16-11-103(2)(b)(III), is fundamentally at odds with the requirement that the procedure produce a certain and reliable conclusion that the death sentence should be imposed. That such a result is mandated by statute rather than arrived at by a jury adds nothing to the reliability of the death sentence. The legislature has committed the function of weighing aggravators and mitigators to the jury. A jury determination that such factors are in equipoise means nothing more or less than that the moral evaluation of the defendant's character and crime expressed as a process of weighing has yielded

inconclusive results. A death sentence imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles. Accordingly, we conclude that the statute contravenes the prohibition of cruel and unusual punishments under article II, section 20, of the Colorado Constitution, and deprives the defendant of due process of law under article II, section 25, of that constitution." 814 P.2d at 845.

Although the decision in *Young* rests upon state constitutional grounds, the court found that the United States Supreme Court had not addressed the equipoise issue, stating:

"Key to the United States Supreme Court rulings is the conclusion that a limitation on the class of persons eligible for the death penalty is constitutionally required and may be accomplished by a finding of at least one aggravating factor, and that a weighing of all relevant mitigating factors is constitutionally required before a sentence of death can be imposed on a particular individual. *Walton [v. Arizona,* 497 U.S. 639*]* 110 S.Ct. [3047] at 3056 [111 L.Ed.2d 511 (1990)] (plurality opinion); *Boyde [v. California,* 494 U.S. 370*]* 110 S.Ct. [1190] at 1196 [108 L.Ed.2d 316 (1990)]; *Blystone [v. Pennsylvania,* 494 U.S. 299*]* 110 S.Ct. [1078] at 1083 [108 L.Ed.2d 255 (1990)]. The basis for these requirements 'is the principle that punishment should be directly related to the personal culpability of the criminal defendant.' *Penry,* 492 U.S. at 319, 109 S.Ct. at 2947. Thus, the Court in *Penry* stated

" ' "that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate

sentence." ' " *Penry,* 492 U.S. at 319, 109 S.Ct. at 2947 (quoting *Woodson,* 428 U.S. at 304, 96 S.Ct. at 2991) (citation omitted).

Constitutional sufficiency is not assured simply because the jury is not limited in the mitigating factors it may hear and consider. The sentencer must also determine whether those mitigating factors are outweighed by the aggravating factors, *Boyde,* 110 S.Ct. at 1196; *Blystone,* 110 S.Ct. at 1083, or, stated alternatively, are sufficient to call for leniency, *Walton,* 110 S.Ct. at 3056. We find nothing in the reasoning in the United States Supreme Court cases cited that casts doubt on our conclusion that the Colorado death penalty statute fails to satisfy our own constitutional standards. We do not believe that the United States Supreme Court cases can be fairly read to contain any suggestion that the death penalty can be imposed when the sentencer finds aggravating and mitigating considerations to be equally balanced. Even if we are wrong in our understanding of federal precedent, however, we hold that to authorize imposition of the death penalty when aggravators and mitigators weigh equally, as does the current version of section 16-11-103, violates fundamental requirements of certainty and reliability under the cruel and unusual punishments and due process clauses of the Colorado Constitution." 814 P.2d at 846.

The third case relied on by Kleypas is *Hulsey v. Sargent,* 868 F.Supp. 1090 (E.D.Ark.1993). At issue in *Hulsey* was the Arkansas statute mandating a death sentence if the mitigating circumstances did not outweigh the aggravating circumstances. 868 F.Supp. at 1092. The court noted the problem such an equation created:

"If a jury found the mitigating and aggravating circumstances in equipoise, neither one more probative than the other, or, could not fairly come to a conclusion about what balance existed between them, they would be *obliged* to impose the death sentence since the mitigating

> circumstances would not be found to outweigh the aggravating. The requirement that the aggravating circumstances justify the sentence of death, which could easily be (and was probably intended to be) construed as an independent inquiry (satisfied by a single finding of an aggravating circumstance) would not cure the presumption created by the equation." 868 F.Supp. at 1101.

The court concluded: "Here, it is explicit in the statute that mitigating must outweigh aggravating circumstances and no saving instruction is found. Here too, the strictures of the Eighth and Fourteenth Amendments with their requirements of individualized sentencing and full consideration of evidence in mitigation appear to require relief." 868 F.Supp. at 1103.

The State does not bother to respond or attempt to distinguish the cases cited by Kleypas. Instead, the State relies completely on *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). In *Walton,* the United States Supreme Court considered the constitutionality of the Arizona statute which provided that the court " 'shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated ... and that there are no mitigating circumstances sufficiently substantial to call for leniency.' " 497 U.S. at 644, 110 S.Ct. 3047.

The State argues that the U.S. Supreme Court specifically addressed this issue in *Walton* and rejected Kleypas' argument. The State's argument is premised on its view that the Arizona statute "is functionally indistinguishable from the Kansas statute in this respect." We disagree and find the two statutes distinguishable. The obvious distinction is the language used in each statute. The Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances, the very essence of the issue before this court. Such a weighing equation results in mandating a death sentence

where the jury finds equipoise as to the mitigating and aggravating circumstances.

As previously noted, the Colorado Supreme Court in *Young* distinguished the language in the Arizona statute from the Colorado statute and found that the issue of equipoise was not raised or decided in *Walton.* 814 P.2d at 846. We agree.

The failure of the plurality in *Walton* to address equipoise was noted by Justice Blackmun in his dissent:

> "The plurality does not attempt to explain why Arizona may require a capital sentence in a case where aggravating and mitigating circumstances are evenly balanced. Indeed, the plurality does not even acknowledge that this is the dispositive question. Instead, it offers only a conclusory assertion: 'So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency. [Citation omitted.]' " 497 U.S. at 688, 110 S.Ct. 3047 (Blackmun, J., dissenting).

Justice Blackmun, however, addressed the issue:

> "If the mitigating and aggravating circumstances are in equipoise, the statute requires that the trial judge impose capital punishment. The assertion that a sentence of death may be imposed in such a case runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a 'determination that death is the appropriate punishment in a specific case.' *Woodson v. North Carolina,* 428 U.S., at 305 [96 S.Ct. 2978] (plurality opinion).
>
> "The plurality takes a hard-line approach and makes little effort to ground its holding on our Eighth Amendment jurisprudence. In support of its position, the plurality

cites only two very recent capital cases, *Blystone v. Pennsylvania,* 494 U.S., at 305 [110 S.Ct. 1078] (1990) and *Boyde v. California,* 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316] (1990). Reliance even on these precedents is misplaced. The statutes upheld in those cases provided that the death penalty would be imposed 'only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances.' *Blystone,* 494 U.S., at 305 [110 S.Ct. 1078]. In neither *Boyde* nor *Blystone* did the challenged statute require a capital sentence when aggravating and mitigating factors are evenly balanced. Those decisions simply do not speak to the issue posed by the Arizona statute: whether the State permissibly may place upon the capital defendant the burden of demonstrating that a sentence of death is not appropriate." 497 U.S. at 687-88, 110 S.Ct. 3047 (Blackmun, J., dissenting).

In *Montana v. Smith,* 261 Mont. 419, 863 P.2d 1000 (1993), the Montana Supreme Court considered the Montana statute which read:

> "In determining whether to impose a sentence of death or imprisonment, the court shall take into account aggravating and mitigating circumstances ... and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency." Mont.Code Ann. § 46-18-305 (1977).

The Montana Supreme Court rejected the *Young* rationale on the basis that the Montana weighing equation was much different from that of Colorado. The court held Montana's statute "requires imposition of the death penalty if the court finds one or more aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency. Unlike the Colorado provision, it does not require

the death sentence to be imposed if the aggravating and mitigating factors are of equal weight." 261 Mont. at 438, 863 P.2d 1000.

The difference between the language in K.S.A. 21-4624(e) and the Arizona statute is expressed in the *amicus curiae* Cornell Death Penalty Project brief as follows:

> "On its face, the Arizona provision operates on a different logic than does section 21-4624(e). Unlike section 21-4624(e), the Arizona statute does *not* tell the sentencer to impose death if aggravating circumstances are not outweighed by mitigating circumstances. Instead, it requires death only if 'there are not mitigating circumstances sufficiently substantial to call for leniency.' The key to the Arizona sentencing formula is the idea of 'sufficiently substantial.'
>
> "That language, unlike section 21-4624(e), does not direct the sentencer to impose death if it finds aggravating and mitigating circumstances are in equipoise. If a sentencer in Arizona thought aggravating and mitigating circumstances were equally balanced, he or she could reasonably conclude that there were mitigating circumstances 'sufficiently substantial to call for leniency,' *or* he or she could reach the opposite conclusion. The law leaves the sentencer free to decide either way. In contrast, a Kansas juror who reached the same conclusion about the relative balance between aggravation and mitigation would have only one option: to impose death. In fact, under the Arizona scheme a sentencer who thought that aggravating circumstances actually *outweighed* mitigating circumstances could *still* conclude that the available mitigating circumstances were 'sufficiently substantial' – i.e., that they crossed some critical threshold of substantiality – to 'call for leniency.' A Kansas juror clearly does not have that option."

This court has addressed this issue in the context of K.S.A.1999 Supp. 21- 4635(c), the hard 40 sentence. *In*

State v. Spain, 269 Kan. 54, 60, 4 P.3d 621 (2000), we held that statute was not unconstitutional. We made it clear that the death penalty cases are not controlling in hard 40 cases. Likewise, hard 40 cases are not controlling when the sentence is death. That distinction is reflected by the State not citing or relying on our decision in *Spain. Spain* is not controlling here because the death penalty is different from all other punishments:

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Justice Stevens wrote:

> "In the 12 years since *Furman v. Georgia,* 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." *Spaziano v. Florida,* 468 U.S. 447, 468, 104 S.Ct. 3154, 82 L.Ed.2d 340 (Stevens, J., concurring in part and dissenting in part).

In *Spain,* we said:

> "In addition, we reaffirm that death penalty cases are not controlling in hard 40 cases. The distinction between the two is obvious. The death penalty as it existed prior to the decision in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), was held to be unconstitutional. The unconstrained discretion in imposing the death penalty constituted cruel and unusual

> punishment in violation of the Eighth and Fourteenth Amendments. The states were required to provide ' "specific and detailed guidance" ' and ' "make rationally reviewable the process for imposing a sentence of death." ' *Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (quoting *Proffitt v. Florida,* 428 U.S. 242, 253, 96 S.Ct. 2960, 49 L.Ed.2d 913 [1976], and *Woodson v. North Carolina,* 428 U.S. 280, 303, 96 S.Ct. 2978, 49 L.Ed.2d 944 [1976], respectively). Not so with a hard 40 sentence. In *State v. Bailey,* 251 Kan. 156, 171, 834 P.2d 342 (1992), we said: '[T]he finality and severity of the imposition of the death penalty, the hurdles the prosecution must clear if the death penalty is to be imposed are higher than in any other area of criminal law.' The United States Supreme Court, in *Rummel v. Estelle,* 445 U.S. 263, 272, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), stated: 'Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.' " 269 Kan. at 59-60, 4 P.3d 621.

No issue is more difficult or divisive than determining to what extent a capital punishment is permitted under the Eighth and Fourteenth Amendments to the United States Constitution. We determined earlier in this opinion that the death penalty in and of itself does not constitute cruel and unusual punishment under the Eighth Amendment. The issue we grapple with here is whether the imposition of the death penalty under our statutory weighing formula constitutes cruel and unusual punishment under the Eighth Amendment. More specifically, is K.S.A. 21-4624(e) applied in an unconstitutional manner by mandating death if the aggravating and mitigating circumstances are in equipoise?

In *Furman v. Georgia,* 408 U.S. 238, 309-10, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court held the death

penalty as imposed in Georgia to be cruel and unusual punishment in violation of the Eighth and 14th Amendments. The Supreme Court did so in a one paragraph, *per curiam* opinion. The rationale of the decision is to be found in the five separate opinions which follow the *per curiam* opinion. That poses some difficulty since none of the five separate opinions concurred in any of the other opinions. Four justices filed separate dissents.

The opinions of Justices White and Stewart are relied on in subsequent opinions of the Supreme Court. Both made it clear that the death penalty is not in itself cruel and unusual under the Eighth Amendment. Justice Stewart's view was that the "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." 408 U.S. at 310, 92 S.Ct. 2726 (Stewart, J., concurring). Justice White wrote: "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313, 92 S.Ct. 2726 (White, J., concurring).

Four years later, the Supreme Court approved the Georgia death penalty statute as amended in response to the Court's decision in *Furman.* In *Gregg v. Georgia,* 428 U.S. 153, 207, 96 S.Ct. 2909, 49 L.Ed.2d 859, *reh. denied* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158, (1976), the Court found the amended death penalty statutes to be constitutional. That decision was announced by three justices: Stewart, Powell, and Stevens. The three justices focused on the procedure by which the defendant was given the death penalty and not the actual punishment. Justices White and Rehnquist and Chief Justice Burger concurred in the judgment by separate opinion, as did Justice Blackmun. The Georgia statute required that the jury must find beyond a reasonable doubt 1 of 10 statutory aggravating circumstances before it can impose a sentence of death.

> "In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. [Citation omitted.] The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, [citation omitted], but it must find a statutory aggravating circumstance before recommending a sentence of death." 428 U.S. at 197, 96 S.Ct. 2909.

Stewart went on to write:

> "No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime). As a result, while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce nondiscriminatory application.' *Coley v. State,* 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974.)" 428 U.S. at 197-98, 96 S.Ct. 2909.

Following the Georgia decision, the Supreme Court invalidated the mandatory death penalty statutes passed in some states in response to *Furman. Woodson v. North Carolina,* 428 U.S. at 303, 96 S.Ct. 2978. The Supreme Court concluded that the death sentence process must

include consideration of the "character and record of the individual offender." 428 U.S. at 304, 96 S.Ct. 2978. In *Penry v. Lynaugh,* 492 U.S. 302, 316, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Court noted:

> "Indeed, as *Woodson v. North Carolina,* 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944] (1976), made clear, 'in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' Id., at 304 [96 S.Ct. 2978] (plurality opinion)."

The Court further stated:

> "Our decisions subsequent to *Jurek [v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)*]* have reaffirmed that the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty. In *Lockett v. Ohio,* 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973] (1978), a plurality of this Court held that the Eighth and Fourteenth Amendments require that the sentencer 'not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " 492 U.S. at 317, 109 S.Ct. 2934.
>
> "Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have

> no such excuse.' *California v. Brown,* 479 U.S. 538, 545 [107 S.Ct. 837, 93 L.Ed.2d 934] (1987) (O'Connor, J., concurring). Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." 492 U.S. at 319, 109 S.Ct. 2934.

Justice O'Connor, concurring in *Franklin v. Lynaugh,* 487 U.S. 164, 184-85, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), wrote:

> "[I]t is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration."

In *Penry,* Justice O'Connor speaking for a majority of the Court wrote:

> "But as we made clear in *Gregg,* so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant. Id., at 197-199, 203, 108 S.Ct. 2320.
>
> ....
>
> " 'In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.' *McCleskey v. Kemp,* 481 U.S. 279, 304 [107 S.Ct. 1756, 95 L.Ed.2d 262] (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the

jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a ' " 'reasoned moral response to the defendant's background, character, and crime.' " ' *Franklin,* 487 U.S., at 184 [108 S.Ct. 2320] (O'Connor, J., concurring in judgment) (quoting *California v. Brown,* 479 U.S., at 545 [107 S.Ct. 837] [O'Connor, J., concurring]). In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' *Woodson,* 428 U.S., at 305 [96 S.Ct. 2978], the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.'' 492 U.S. at 327, 109 S.Ct. 2934.

Penry argued that the jury was unable to express its "reasoned moral response" to his mitigation evidence of his mental retardation and childhood abuse in determining if death was an appropriate sentence. The Court agreed, stating:

> "In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' *Lockett,* 438 U.S., at 605 [98 S.Ct. 2954]; *Eddings,* 455 U.S., at 119 [102 S.Ct. 869] (O'Connor, J., concurring). 'When the choice is between life and death, that risk is unacceptable and incompatible

> with the commands of the Eighth and Fourteenth Amendments.' *Lockett,* 438 U.S., at 605 [98 S.Ct. 2954]." 492 U.S. at 328, 109 S.Ct. 2934.

In *Woodson,* Justice Stewart speaking for the majority wrote:

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles,* 356 U.S., at 100 [78 S.Ct. 590] (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." 428 U.S. at 304-05, 96 S.Ct. 2978 (Brennan, J., concurring).

If we are to give more than lip service to the principles espoused by the Supreme Court, then the weighing equation in K.S.A. 21-4624 cannot be approved. The Eighth Amendment forbids unguided discretion in imposing a sentence of death. Under our statutes, the jury discretion is guided by requiring that it find the existence of one statutory aggravated circumstance. That narrows the class of those eligible for the death penalty. The Supreme Court has made it clear that the process cannot stop there. Of equal importance is the sentencer's consideration of the mitigating circumstances. Here, the jury as the fact finder must be given discretion in considering and giving effect to the mitigating circumstances. As previously noted, the Georgia capital

sentencing statutes, approved in *Gregg,* did not limit the jury's consideration of the mitigating circumstances. Here, the weighing equation not only limits the jury's consideration, it mandates death if the aggravating and mitigating circumstances are equal. As such, it denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstance that it finds exist.

It is important to note that on March 14, 1995, the attorney general analyzed the statute and recommended in the House Judiciary Committee of the Kansas Legislature that the statute be amended to require that aggravating circumstances outweigh mitigating circumstances, stating: "Now if they are equal, 'tie' goes to state. We're proposing 'tie' goes to defense...." Unfortunately, the legislature did not follow the attorney general's recommendation.

As the New Jersey Supreme Court pointed out in *Biegenwald,* there is a similarity of the jury's function in weighing the aggravating and mitigating circumstances to that of determining guilt or innocence of the defendant. The burden is the same. The process is much the same and the outcome as serious, if not more so. The penalty of death is not only unique in its severity, but it is irrevocable. The United States Supreme Court noted the similarity in *Spaziano v. Florida,* 468 U.S. at 458-59, 104 S.Ct. 3154:

> "This Court, of course, has recognized that a capital proceeding in many respects resembles a trial on the issue of guilt or innocence. See *Bullington v. Missouri,* 451 U.S. 430, 444 [101 S.Ct. 1852, 68 L.Ed.2d 270] (1981). Because the ' "embarrassment, expense and ordeal" ... faced by a defendant at the penalty phase of a ... capital murder trial ... are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial,' the Court has concluded that the Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty. Id., at 445 [101 S.Ct. 1852], quoting *Green v. United States,* 355 U.S. 184, 187 [78 S.Ct. 221, 2 L.Ed.2d 199] (1957); *Arizona v. Rumsey,* 467 U.S. 203 [104 S.Ct. 2305, 81 L.Ed.2d 164] (1984)."

The legislature cannot mandate a death sentence for any category of murder. The legislature is limited to defining who is eligible, within constitutional limits, to receive the death penalty. It is for the jury, within permissible guidelines, to determine who will live and who will die. The issue is not whether the penalty of death is per se cruel and unusual punishment. *Furman* did not hold that the death penalty was cruel and unusual punishment per se under the Eighth Amendment. Here the issue, as that before the *Furman* court, is whether the process used to select which defendant will receive the irrevocable penalty of death "comports with the basic concept of human dignity at the core of the [Eighth] Amendment." *Gregg,* 428 U.S. at 183, 96 S.Ct. 2909.

Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its "reasoned moral response" to the mitigating circumstances? We conclude it does not. Nor does it comport with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a "tie goes to the defendant" when life or death is at issue. We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional.

Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death

penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise.

In *State v. Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976), the defendant challenged the constitutionality of the definition of obscene material contained in K.S.A. 21-4301(2)(a) and (3) (Weeks). In 1973, the United States Supreme Court in *Miller v. California,* 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), revised the test for obscenity. The definition of obscene material in K.S.A. 21-4301 (Weeks) did not conform to the constitutional requirements of *Miller.* The district court, however, found the films to be obscene by construing the broader definition in our statute to conform to the requirement of the *Miller* decision. Simply stated, the district court read the *Miller* standards into K.S.A. 21- 4301. This court affirmed the district court on appeal, stating:

> "This court has on previous occasions seen fit to construe and limit criminal statutes in such a way as to uphold their constitutionality by reading judicial requirements into statutes which otherwise were overbroad.
>
> ....
>
> "Construction of this sort, moreover, was invited by the United States Supreme Court in *Miller* in which the Chief Justice speaking for a majority said:
>
> 'We do not hold ... that all States ... must now enact new obscenity statutes. Other existing state statutes as construed heretofore or hereafter, may well be adequate. [Citation omitted]' (413 U.S. at 24, note 6, 93 S.Ct. at 2615, 37 L.Ed.2d at 430.)
>
> "The high court has itself adopted this course of judicial construction of statutes as noted in *United States v. 12-200-Ft. Reels of Film,* 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500, and in *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, reh. den. 403 U.S. 924, 91 S.Ct. 2221, 29 L.Ed.2d 702, with respect to federal statutes.

> "In at least nine other states the courts have held that their obscenity statutes, though not couched in the language of *Miller,* should be judicially construed in a manner consistent with *Miller* and thereby evade constitutional challenge in the future. [Citations omitted.]
>
> "We realize that to construe the statute to meet constitutional standards we may be subject to the accusation that we are invading the province of the legislature. However, after considering the manifest intention of the legislature when it passed K.S.A. 21-4310, *et seq.,* and our past difficulties in this area of regulating obscenity we feel fully justified in construing and limiting the present statute to meet constitutional standards. Such was the original intent of the Kansas legislature." 219 Kan. at 70-71, 547 P.2d 760.

This court then "authoritatively" construed K.S.A. 21-4301 (Weeks) to include the *Miller* test and held a conviction may be had under the statute.

In *In re Adoption of Baby Boy L.,* 231 Kan. 199, 223, 643 P.2d 168 (1982), Justice Holmes, speaking for the court, said:

> "In examining the constitutionality of any statute there are certain basic principles which must be adhered to:
>
> " 'We start with the proposition that the constitutionality of a statute is presumed; that all doubts must be resolved in favor of its validity, and before the statute may be stricken, it must clearly appear the statute violates the Constitution. It is the court's duty to uphold the statute under attack, if possible, rather than defeat it. If there is any reasonable way a statute may be construed constitutionally permissible, that should be done.' *Board of Greenwood County Comm'rs v. Nadel,* 228 Kan. 469, Syl. ¶ 1, 618 P.2d 778 (1980).
>
> " 'A statute, apparently valid upon its face, may be unconstitutional in its application to a particular set of facts, circumstances or classifications.' *Flax v. Kansas*

Turnpike Authority, 226 Kan. 1, Syl. ¶ 6, 596 P.2d 446 (1979).

"The corollary of *Flax,* of course, is that a statute apparently void on its face may be constitutional when limited and construed in such a way as to uphold its constitutionality by reading the necessary judicial requirements into the statute. This has often been done when it is clear that such an interpretation will carry out the intent of the legislature. *State v. Motion Picture Entitled "The Bet "*, 219 Kan. 64, 70, 547 P.2d 760 (1976); *State v. Gunzelman,* 210 Kan. 481, 502 P.2d 705 (1972); *State v. Hart,* 200 Kan. 153, 434 P.2d 999 (1967)."

In *State v. Durrant,* 244 Kan. 522, 769 P.2d 1174 (1989), the district court ruled K.S.A. 79-5201 *et seq.* (Ensley) unconstitutional in violation of the Fifth Amendment to the United States Constitution. The district court held K.S.A. 79-5206 (Ensley) did not grant absolute immunity and thus did not prohibit the use of the information in prosecuting for other crimes. In other words, as written, K.S.A. 79-5206 granted use immunity but not derivative-use immunity. This court, relying on *In re Adoption of Baby Boy L.* and *State v. Motion Picture Entitled "The Bet,"* reversed the district court:

"This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute. To accomplish this purpose the court may read the necessary judicial requirements into the statute. *In re Adoption of Baby Boy L.,* 231 Kan. 199, Syl. ¶ 13, 643 P.2d 168 (1982); *State v. Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976); *State v. Gunzelman,* 210 Kan. 481, 502 P.2d 705 (1972); *State v. Hart,* 200 Kan. 153, 434 P.2d 999 (1967). We think it is obvious, and we so hold, that the legislature, by its enactment of 79-5206 as a part of the

act, intended to extend not only use immunity but also derivative-use immunity to any person complying with the act. As construed, the immunity granted by the act is at least coextensive with the privilege against self-incrimination provided by the Fifth Amendment of the United States Constitution, and the act as so construed is constitutional." 244 Kan. at 534-35, 769 P.2d 1174.

The legislative intent in passing the death penalty act is obvious. K.S.A. 21-4624 provides for a death sentencing scheme by which a sentence of death is imposed for certain offenses. By simply invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist, the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the Eighth Amendment prohibition against cruel and unusual punishment. Our holding requires that this case be remanded for the jury to reconsider imposition of the death penalty.

We set aside the death sentence for the reasons set out above and remand for resentencing in accordance with K.S.A. 21-4624 as construed herein.

Because we hold that the provisions of K.S.A. 21-4624 are constitutional as interpreted by this court, it becomes necessary to address Kleypas' additional constitutional challenges regarding capital murder provisions of Kansas statutory law.

* * * *

DAVIS, J., dissenting:

I join the majority opinion in all respects except on the issue of equipoise. I respectfully dissent from the majority's conclusion that the weighing equation within the Kansas

death penalty statute, K.S.A. 21-4624(e), violates the Eighth Amendment to the United States Constitution because it mandates death where mitigating circumstances and aggravating circumstances are found to be equal (equipoise). The express provisions of K.S.A. 21-4624(e) mandate the imposition of a death sentence where "the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." Yet, the majority changes the express language of the legislature to say that death may be mandated only where *aggravating circumstances outweigh any mitigating circumstance found to exist.*

The majority reverses the weighing equation adopted by the legislature in K.S.A. 21-4624(e) with the idea that the intent of the legislature is to be carried out in a constitutional manner. There is no question, based on the express language of the legislature, that it intended to mandate the imposition of a death sentence where the existence of such aggravating circumstances is not outweighed by any mitigating circumstances found to exist. The precise question was brought to the attention of the legislature in testimony by the attorney general, who recommended that the statute provide for the aggravating circumstances to outweigh the mitigating circumstances before a death sentence may be imposed. The legislature rejected that suggestion of the attorney general and adopted our present statute.

The majority, however, replaces the express language with its own language based upon its conclusion that this new language carries out the intent of the legislature in a constitutional manner. Because the new language mandated by the majority is contrary to the expressed intent and language adopted by the legislature in K.S.A. 21-4624(e), I believe the majority *invades the province of the legislature.* In the face of a clearly expressed legislative intent, the majority not only strikes this clear language as unconstitutional but adopts language exactly the opposite of what the legislature stated. If the language of the statute

offends the Constitution, the appropriate judicial solution, in my opinion, is to so hold and let the legislature resolve the matter consistent with the court's opinion.

More importantly, however, I respectfully dissent from the majority's conclusion that the weighing equation contained in K.S.A. 21-4624(e) is unconstitutional. Thus, I would conclude that there is no need to change the weighing equation in that it is constitutional under the Eighth Amendment as expressed by the Kansas Legislature in accordance with *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

The majority holds that the weighing equation contained in K.S.A. 21- 4624(e) violates the United States and Kansas Constitutions because it mandates a sentence of death when the aggravating and mitigating circumstances are found to be in equipoise. K.S.A. 21-4624(e) states:

> "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law."

The statute provides that the defendant "shall" be sentenced to death where the jury finds that the mitigating circumstances do not outweigh the aggravating circumstances. Theoretically, if the jury were to somehow determine that the aggravating and mitigating circumstances were equally balanced, the defendant would be sentenced to death, as the mitigators would not outweigh the aggravators. The question is whether a weighing equation which has the potential to produce this result is unconstitutional. It is a question of law over which appellate review is unlimited.

As noted in the majority decision, this court has previously rejected the argument that this same weighing equation was

unconstitutional in the context of a hard 40 sentencing decision in *State v. Spain*, 269 Kan. 54, 4 P.3d 621 (2000). However, the majority correctly points out that our decision in Spain was premised in part on the concept that noncapital cases are of limited precedential value in analyzing capital cases due to the greater scrutiny to which capital cases must be held. See *Spain*, 269 Kan. at 59- 60, 4 P.3d 621. Thus, the result in Spain is not controlling, and the question must instead be analyzed through the specialized lens of the strictures of the United States Constitution with regard to a sentence of death.

The United States Supreme Court has imposed a number of requirements on the capital sentencing process. States must limit and channel the discretion of judges and juries in order to minimize the risk of wholly arbitrary and capricious action. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, *reh. denied* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976). At the same time, the sentencer must be allowed to retain sufficient discretion to consider the particular circumstances of the crime and the characteristics of the defendant. See *Gregg*, 428 U.S. at 196-98, 96 S.Ct. 2909; *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). One way in which this may be accomplished is through a process which requires the sentencer to weigh certain aggravating and mitigating circumstances in order to determine whether a defendant should be sentenced to death. *Proffitt v. Florida*, 428 U.S. 242, 259-60, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (holding that a scheme which required the sentencer to determine whether mitigating circumstances were sufficient to outweigh aggravating circumstances adequately guided and channeled the sentencer's discretion).

While the Court has imposed numerous requirements on the guiding and channeling of the sentencer's discretion, the actual weighing of aggravating and mitigating circumstances has been left up to the states. In *Zant v. Stephens*, 462 U.S. 862, 890, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the Court

stated that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Similarly, in *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the Court stated: "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

The Court continued this theme in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), and *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). In Blystone, the question was whether a weighing equation which made the death penalty mandatory where aggravating circumstances outweighed mitigating circumstances was constitutional. The Court ruled that it was, stating: "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." 494 U.S. at 307, 110 S.Ct. 1078. The Court noted: "Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." 494 U.S. at 309, 110 S.Ct. 1078.

In *Boyde*, the question was the same as that in *Blystone*: whether that State's death penalty scheme, which required death when aggravating circumstances outweighed mitigating circumstances and required life when mitigating circumstances outweighed aggravating circumstances, was constitutional. The defendant argued that the jury must have freedom to reject the death penalty even if it found that aggravating circumstances outweighed mitigating circumstances. The Court, however, stated: "[T]here is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' " 494 U.S. at 377, 110 S.Ct. 1190.

In both *Blystone* and *Boyde*, the Court faced a statute which mandated death when the aggravators outweighed the mitigators. This changed, however, with a third death penalty case decided in 1990, *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511. *Walton* involved the constitutionality of the Arizona death penalty scheme. I believe *Walton* is ultimately determinative of the question in this case. In order to place the Court's decision in *Walton* in context, it is necessary to detail the events which led up to the decision.

The Arizona statute at issue in *Walton* provided that the sentencing judge "shall" impose the death penalty if one or more aggravating circumstances is found and the "mitigating circumstances are held insufficient to call for leniency." The majority places great emphasis upon the difference between the language of the Arizona statute and the Kansas statute. K.S.A. 21-4624(e) provides that death is mandated where aggravating circumstances are not outweighed by mitigating circumstances. What the majority fails to note is that the Arizona Supreme Court interpreted (and still interprets) the weighing equation to mean the same as that stated by the Kansas statute: The death penalty shall be imposed where the aggravating circumstances are not outweighed by the mitigating circumstances. See *State v. Ysea*, 191 Ariz. 372, 375, 956 P.2d 499 (1998) ("If the judge finds one or more of the aggravating factors listed in § 13-703[F], the defendant is death eligible, and if the aggravating factors are not outweighed by mitigating factors listed in § 13-703[G], the resulting sentence is death."); *State v. Gretzler*, 135 Ariz. 42, 53-55, 659 P.2d 1 (1983); see also *Walton*, 497 U.S. at 687, 110 S.Ct. 3047 (Blackmun, J., dissenting) ("The Arizona Supreme Court repeatedly has indicated that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' only if the mitigating factors 'outweigh' those in aggravation.").

The issues in *Walton* developed as the result of a controversy over whether this formulation of the weighing equation

violated the United States Constitution. In *State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017 (1989), the defendant challenged the Arizona statutory scheme as unconstitutional, arguing, *inter alia*, that "it impermissibly places the burden of proof of mitigation on the defendant" and "it does not require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating ones." The Arizona Supreme Court summarily rejected these arguments. 159 Ariz. at 584-85, 769 P.2d 1017. However, less than 2 months earlier, the Ninth Circuit Court of Appeals had been more receptive to an attack on the Arizona statutory scheme. See *Adamson v. Ricketts*, 865 F.2d 1011, 1043 (1988). In *Adamson*, the court held the Arizona death penalty scheme unconstitutional:

> "While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that '[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect.' [Citation omitted]." 865 F.2d at 1043-44.

The above holding is strikingly similar to the majority opinion in this case. *Adamson and Walton* created a split, with the Ninth Circuit holding the Arizona death penalty scheme unconstitutional while the Arizona Supreme Court found it to be constitutional. The United States Supreme Court granted *certiorari* in *Walton* in order to resolve the conflict between *Walton and Adamson*. See *Walton*, 497 U.S. at 647, 110 S.Ct. 3047.

There are two parts of the *Walton* decision which are important to the resolution of this issue in this case: Parts III and IV. In Part III, the Court addressed Walton's contention that the Arizona statute violated the Eighth Amendment because it imposed a burden on defendants to establish mitigating circumstances sufficiently substantial to call for leniency. The Court quickly dispensed with this argument, stating:

> "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 650, 110 S.Ct. 3047.

While instructive, Part III, standing alone, is not determinative of our issue, as it is more concerned with the burden of proving mitigating circumstances rather than the weighing of mitigating and aggravating circumstances.

However, in Part IV, the *Walton* Court addressed the equipoise question raised by *Adamson*. The Court framed the issue as follows: "Walton insists that because [Arizona's statute] provides that the court 'shall' impose the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency, the statute creates an unconstitutional presumption that death is the proper sentence." 497 U.S. at 651, 110 S.Ct. 3047. This is the equipoise argument, viz., that a statute requiring the imposition of a death sentence is unconstitutional where the mitigating circumstances do not outweigh or are equal to the aggravating circumstances. The Court rejected this argument, stating: "Our recent decisions in [*Blystone*] and [*Boyde*] foreclose this submission" and noting again that "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve

a more rational and equitable administration of the death penalty.' " 497 U.S. at 651-52, 110 S.Ct. 3047.

Thus, the Court in *Walton* found that it was not unconstitutional for a statute to mandate death where aggravating circumstances are found and mitigating circumstances are insufficient to call for leniency, that is, under Arizona's interpretation, where the aggravating circumstances are not outweighed by the mitigating circumstances. That this was the holding of the majority in *Walton* is clearly demonstrated by the dissent in *Walton*. Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented, arguing:

> "If the mitigating and aggravating circumstances are in equipoise, the [Arizona] statute requires that the trial judge impose capital punishment. The assertion that a sentence of death may be imposed in such a case runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a 'determination that death is the appropriate punishment in a specific case.' [Citation omitted.]" 497 U.S. at 687, 110 S.Ct. 3047.

In my opinion, the Court's decision in *Walton* settles the question of equipoise of aggravating and mitigating circumstances under the United States Constitution. Contrary to the majority, *Walton* makes it clear that as long as the statute does not preclude the sentencer from considering relevant mitigating evidence, the specific method of balancing the aggravating and mitigating circumstances is left up to the States. See 497 U.S. at 650-52, 110 S.Ct. 3047.

The Ninth Circuit Court of Appeals has recognized that *Walton* overruled its *Adamson* decision regarding the constitutionality of the Arizona statute. See *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir.1992). The Supreme Court of Illinois, in a case handed down immediately prior to *Walton*, presaged the *Walton* reasoning in rejecting the *Adamson* holding and the argument that its statute was

unconstitutional because it mandated death unless the mitigating circumstances outweighed the aggravating circumstances. *People v. Thomas*, 137 Ill.2d 500, 148 Ill.Dec. 751, 561 N.E.2d 57 (1990). The Illinois court found: "The United States Supreme Court has apparently put this argument to rest in [*Blystone*, 494 U.S. 299, 110 S.Ct. 1078]." 137 Ill.2d at 542, 148 Ill.Dec. 751, 561 N.E.2d 57. Later, the Idaho Supreme Court, citing Walton, found that its statute which required a defendant to provide mitigating circumstances which outweighed aggravating circumstances in order to avoid death, was constitutional. *State v. Hoffman*, 123 Idaho 638, 646-47, 851 P.2d 934 (1993).

The majority opinion on this issue echos the arguments made by Kleypas and his reliance upon the cases of *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987); *People v. Young*, 814 P.2d 834 (Colo.1991); and *Hulsey v. Sargent*, 868 F.Supp. 1090 (E.D.Ark.1993). None of these cases, in my opinion, are particularly persuasive.

Biegenwald was decided in 1987, and is thus pre-*Walton*. The language of the New Jersey statute examined in *Biegenwald* required the jury to sentence the defendant to death if it found an aggravating factor that was not outweighed by any one or more mitigating factors. The court found that "fundamental fairness" required that the defendant get the benefit of the doubt where "the explanations for his misconduct (the mitigating factors) were equally as significant as the culpable aspects of that misconduct (the aggravating factors)." 106 N.J. at 62, 524 A.2d 130. However, the *Biegenwald* court did not key this "fundamental fairness" to the United States Constitution but rather to "New Jersey's traditional concern for the rights of defendants charged with capital offenses" and its conviction that the legislature actually meant to enact legislation that requires the aggravating factors to outweigh the mitigating factors. See 106 N.J. at 58-67, 524 A.2d 130. The *Biegenwald* Court then proceeded to rewrite the New Jersey statute to say exactly the opposite of what the language said.

However, unlike the majority opinion in this case, the New Jersey Supreme Court based its decision on significant legislative history which indicated that the legislature might have been confused at to what weighing equation it actually intended to use. *Biegenwald*, based on New Jersey's notion of fundamental fairness and a tortured statutory interpretation, provides little, if any, authority for a conclusion that a weighing equation which requires mitigators to outweigh aggravators violates the United States Constitution.

The only two post-*Walton* cases providing some support for the majority are *Hulsey* and *Young*. Both cases address the precise question raised and conclude that the weighing equation mandating death where mitigating circumstances do not outweigh aggravating circumstances is unconstitutional.

Hulsey was a federal district court case decided by the Eastern District of Arkansas. In *Hulsey*, the petitioner sought habeas corpus relief from the former Arkansas death penalty statute which had been amended at the time of trial. The court found that the Arkansas death penalty statute was unconstitutional because it mandated death if mitigating circumstances did not outweigh aggravating circumstances. 868 F.Supp. at 1103. The court was concerned the following situation would violate due process:

> "If a jury found the mitigating and aggravating circumstances in equipoise, neither one more probative than the other, or, could not fairly come to a conclusion about what balance existed between them, they would be obliged to impose the death sentence since the mitigating circumstances would not be found to outweigh the aggravating." 868 F.Supp. at 1101.

Remarkably, the court in *Hulsey* did not attempt to distinguish or even mention *Walton*, which, as noted above, addressed this precise issue in Part IV of the opinion. Instead, *Hulsey* relied on the reasoning in *Adamson*, the case

Walton abrogated in reaching its decision. The *Hulsey* court stated:

> "Following the logic of the Ninth Circuit, the death presumption and burden shifting claims may be collapsed into one inquiry: whether the weighing equation as drawn 'offends federal due process by effectively mandating death.' The Court concludes that under the Arkansas statute under which petitioner was sentenced, it does." 868 F.Supp. at 1103.

It is highly questionable, in my opinion, whether *Hulsey*, with its reliance on *Adamson*, would have survived appellate review. However, the State's appeal in *Hulsey* was dismissed by the Eighth Circuit Court of Appeals because the State had failed to timely file its notice of appeal. See *Hulsey v. Sargent*, 15 F.3d 115, 118-19 (8th Cir.1994).

In *Young*, the Colorado Supreme Court interpreted the Colorado death penalty statute enacted in 1988. Under pre 1988 law, the Colorado statute required that the jury find that the aggravating factors were not outweighed by the mitigating factors and then further decide that death was the appropriate penalty in order to impose a death sentence. The 1988 law eliminated this last step and mandated a death sentence where the aggravating factors were not outweighed by the mitigating factors. The *Young* court, in declaring the death penalty statute unconstitutional, was very concerned with the elimination of the final step, stating:

> "The result of a decision that the relevant considerations for and against imposition of the death penalty in a particular case are in equipoise is that the jury cannot determine with reliability and certainty that the death sentence is appropriate under the standards applied by the legislature. A statute that requires a death penalty to be imposed in such circumstances without the necessity for further deliberations, as does section 16-11-103(2)(b)(III), is fundamentally at odds with the requirement that the procedure produce a certain and

> reliable conclusion that the death penalty should be imposed.... A death sentence imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles. [Citations omitted.]" 814 P.2d at 845.

The *Young* court distinguished *Walton*, contending that *Walton* did not consider the question of whether a death sentence could be imposed when aggravators and mitigators are in equipoise. 814 P.2d at 845 n. 9. The court stated: "We do not believe that the United States Supreme Court cases can fairly be read to contain any suggestion that the death penalty can be imposed when the sentencer finds aggravating and mitigating considerations to be equally balanced." 814 P.2d at 846. However, as noted above, *Walton* approved the Arizona statute which mandated the death penalty where the mitigating circumstances did not outweigh the aggravating circumstances. See 497 U.S. at 650-52, 110 S.Ct. 3047.

The *Young* court misinterpreted Arizona's sentencing scheme. In reviewing United States Supreme Court decisions, the *Young* court stated: "The sentencer must also determine whether those mitigating factors are outweighed by the aggravating factors, *Boyde*, 110 S.Ct. at 1196; *Blystone*, 110 S.Ct. at 1083, or, stated alternatively, are sufficient to call for leniency, *Walton*, 110 S.Ct. at 3056." 814 P.2d at 846. Thus, the *Young* court lumped the Arizona statute at issue in *Walton* with the statutes in *Boyde* and *Blystone* as requiring the aggravating circumstances to outweigh the mitigating circumstances to impose death. A correct interpretation of the Arizona statute in *Walton* demonstrates that Arizona law required the mitigating circumstances to outweigh the aggravating circumstances in order to reject a death sentence. Had the *Young* court correctly interpreted the Arizona statute, viz, the way it was interpreted in *Walton*, it would have had a difficult time distinguishing *Walton* from the Colorado statute.

In any event, the *Young* court did not ultimately decide to base its decision on the United States Constitution. Rather, the court decided that if it was wrong in its understanding of federal precedent, it would hold that the Colorado sentencing scheme violated the Colorado Constitution and it, therefore, invalidated the scheme on state constitutional grounds. 814 P.2d at 845-46.

It should be noted that the Colorado Legislature in reaction to the *Young* decision, passed a new death penalty statute which still authorizes the death penalty where aggravating circumstances are not outweighed by mitigating circumstances, although it does not mandate it. Under the Colorado scheme, after a finding that the aggravating circumstances are not outweighed by mitigating circumstances, a panel of judges then determines whether the death penalty is the appropriate punishment for that particular case. Colo.Rev.Stat. § 16-11-103. The Colorado Supreme Court has determined that this procedure satisfies the problem it identified in *Young*. See *State v. Dunlap*, 975 P.2d 723, 736 (1999). Thus, it appears that the Colorado Supreme Court's objection to the statute at issue in *Young* was not that it authorized death where the aggravating circumstances are not outweighed by the mitigating circumstances but, instead, that it mandated death in that situation.

Since *Walton*, there has been only one case, *Hulsey*, which held that a statutory scheme providing for a sentence of death where mitigating circumstances do not outweigh aggravating circumstances was barred by the United States Constitution and its value is highly questionable. The language in the *Young* decision provides some support for the majority decision in this case, but the ultimate decision was based not on the United States Constitution but, rather, on the Colorado Constitution. Meanwhile, Arizona, Idaho, and Illinois have reached the opposite conclusion.

Since *Walton*, the United States Supreme Court has reaffirmed its earlier statements regarding the abilities of the states to enact their own weighing schemes. In *Harris v. Alabama*, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995), the Court faced the question of whether Alabama's death penalty statute was unconstitutional because it failed to give the trial judge any standards for accepting or rejecting the jury's advisory verdict of life or death. The Court found no violation, reemphasizing: "We have rejected the notion that 'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.' " 513 U.S. at 512, 115 S.Ct. 1031. The Court also stated:

> "What purpose is served by capital punishment and how a State should implement its capital punishment scheme – to the extent that those questions involve only policy issues – are matters over which we, as judges, have no jurisdiction. Our power of judicial review legitimately extends only to determine whether the policy choices of the community, expressed through its legislative enactments, comport with the Constitution." 513 U.S. at 510, 115 S.Ct. 1031.

Similarly, in *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), the Court found that the Eighth Amendment did not require the sentencing jury to be instructed on particular mitigators or how to apply them, stating:

> "In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. [Citations omitted.] *However, the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence.* [Citations omitted.] *Our consistent concern has been that restrictions on the jury's sentencing determination not*

preclude the jury from being able to give effect to mitigating evidence.

"*But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence.*" (Emphasis added.)

The United States Supreme Court opinions on the subject make it clear that as long as a State's scheme allows the sentencer to give effect to mitigating evidence, the Eighth Amendment is satisfied. In *Walton*, the Court upheld a statute substantially similar to K.S.A. 21-4624 as constitutional, despite the fact that it mandated death where the mitigating circumstances did not outweigh the aggravating circumstances. Arizona has followed *Walton* and continues to apply its statute. Illinois and Idaho have relied on *Walton* and *Boyde* to hold their statutes constitutional notwithstanding that they also contain a Kansas-type of weighing equation which requires that aggravators are not outweighed by mitigators. The only post-*Walton* case which has affirmatively held that a statute violates the United States Constitution in mandating death where the mitigating circumstances do not outweigh the aggravating circumstances, *Hulsey*, is unpersuasive in that it does not mention *Walton* and instead relies on *Adamson*, which *Walton* abrogated. In *Young*, the Colorado Supreme Court decided the matter based on the Colorado Constitution rather than the federal one and misinterpreted the Arizona sentencing scheme in reaching that result.

For all the above reasons, I would hold that *Walton* is dispositive of the issues raised here and that the weighing equation contained in K.S.A. 21-4624(e) does not violate the United States Constitution.

Kleypas also contends that the weighing equation should be held unconstitutional under the Kansas Constitution. Based upon the majority decision, there was no need to address this argument. Based upon my dissent, there would be a need to

address Kleypas' claim. However, in doing so, I note that "[t]his court has never extended greater protection to our citizens beyond the federal guarantees." *State v. Spain*, 269 Kan. 54-59, 4 P.3d 621 (2000). As a result, I conclude that the weighing equation contained in K.S.A. 21- 4624(e) does not violate the Kansas Constitution.

McFARLAND, C.J., joins in the foregoing dissent.

ABBOTT, J., dissenting:

I concur with Justice Davis' dissent. I have no quarrel with anything in Justice Davis' dissent, which I consider to be excellent. I would merely add the following thoughts.

The American Law Institute Model Penal Code § 210.6(2) (1985) (adopting 1962 official draft) requires mitigating circumstances to outweigh aggravating circumstances. The Model Penal Code provides for a hearing either before a jury or before a judge, and the language indicates that if the sentencer finds one of the aggravating circumstances it still may not impose the death penalty unless it "further finds there are no mitigating circumstances sufficiently substantial to call for leniency." To me, this obviously requires the defendant to come forth with evidence of mitigating circumstances sufficiently substantial to call for leniency. It simply requires mitigating circumstances to outweigh the aggravating circumstances to prevent the death penalty from being imposed.

Justice Davis has thoroughly discussed the cases set forth below. I would rely on them.

In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the Court stated:

"So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently

substantial to call for leniency." 497 U.S. at 650, 110 S.Ct. 3047.

Kleypas attempts to distinguish *Walton* on the basis that the Arizona statute does not mandate a death sentence if the sentencing court finds the aggravators and mitigators in equal balance. The Ninth Circuit Court of Appeals disagreed in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir.1988) (en banc) noting that "under the Arizona statute, the death sentence will be imposed unless mitigating circumstances *outweigh* the aggravating circumstances," and "in situations where the mitigating and aggravating circumstances are in balance ... the statute bars the court from imposing a sentence less than death." 865 F.2d at 1042 n. 50, 1043.

In *People v. Bean*, 137 Ill.2d 65, 147 Ill.Dec. 891, 560 N.E.2d 258 (1990), *cert. denied* 499 U.S. 932, 111 S.Ct. 1338, 113 L.Ed.2d 270 (1991), the court concluded:

> "The defendant does not alone have a burden of persuasion at this balancing stage, for the State is the movant, the party seeking the death penalty, and so bears the primary burden of persuading the jury that, as the statute states, there are no mitigating factors sufficient to preclude the sentencer from imposing the sentence of death for which the defendant is eligible. [Citation omitted.]" 137 Ill.2d at 139, 147 Ill.Dec. 891, 560 N.E.2d 258.

Further,

> "because this is a process of balancing intangibles, not of proving facts, it is improper to speak of defendants as having a 'burden.' After the State as movant has attempted to persuade the jury the death sentence should be imposed, a defendant may attempt to dissuade the jury from doing so. Whether defendant attempts to dissuade the jury, whether he decides to take up this burden, is up to him; the law does not require him to take it up." 137 Ill.2d at 140, 147 Ill.Dec. 891, 560 N.E.2d 258.

In *State v. Spain*, 263 Kan. 708, 725, 953 P.2d 1004 (1998), Spain was convicted and received a hard 40 sentence. His sentence was vacated and remanded. On remand, the trial court found one aggravating and one mitigating circumstance, and found them to be of equal weight. The trial court interpreted K.S.A.1999 Supp. 21-4635(c) to require a hard 40 sentence when aggravators and mitigators were in equipoise. Spain was sentenced to a term of 40 years without parole. See *State v. Spain*, 269 Kan. 54, 58, 4 P.3d 621 (2000).

On appeal, Spain argued that 21-4635(c) violated state and federal constitutional prohibitions against cruel and unusual punishment. He relied on death penalty cases, including *Hulsey v. Sargent*, 868 F.Supp. 1090 (E.D.Ark.1993); *People v. Young*, 814 P.2d 834 (Colo.1991); and *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987), to support his argument. The State, as it did here, relied on *Walton*.

This court pointed out that the court in *Young* interpreted the Colorado Constitution to provide broader protection under its cruel and unusual punishment clause than that offered by the Eighth Amendment to the United States Constitution. For that reason, this court noted, *Young* distinguished *Walton*. 269 Kan. at 59, 4 P.3d 621. In discussing *Walton*, this court stated:

> "In *Walton*, five justices agreed the Arizona death penalty statute did not create an unconstitutional presumption in favor of the death penalty. The statute at issue in *Walton* required imposition of the sentence of death if any aggravating circumstances were established and there were '"no mitigating circumstances sufficiently substantial"' to warrant leniency. [Citations omitted.] Although the language chosen by the Arizona Legislature does not include the terms 'weigh' or 'outweigh,' what the statute prescribes is a weighing process that results in imposition of the death penalty if the mitigating

circumstances are not of sufficient weight to tip the balance toward leniency.

"As previously noted, the Colorado Supreme Court interpreted its own constitutional provisions to grant greater protection than the comparable United States constitutional provision. Thus, *Walton* was not controlling. *In contrast, this court has never extended greater protection to our citizens beyond the federal guarantees.* [Citation omitted.]" (Emphasis added.) 269 Kan. at 59, 4 P.3d 621.

This court reaffirmed that death penalty cases are not controlling in hard 40 cases. 269 Kan. at 59, 4 P.3d 621. That said, this court quoted the following key passage from *Walton*:

"'So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.' " 269 Kan. at 60, 4 P.3d 621 (citing *Walton*, 497 U.S. at 650, 110 S.Ct. 3047).

As the Fourth Circuit Court of Appeals stated, in summarizing the relevant Supreme Court philosophy:

"The procedure involved in imposing the death penalty need not be structured to favor a defendant but need only avoid creating a fundamentally unfair trial. See *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). The best of all procedural worlds is not guaranteed by the United States Constitution. *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). In *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the Supreme Court emphasized that in designing a constitutional capital punishment system, all that the state is required to provide is a meaningful basis for distinguishing between those

trials resulting in a penalty of death and those in which a penalty of life imprisonment is imposed. Under Zant, this is accomplished by simply identifying aggravating circumstances and requiring that one or more of them be found." *Rook v. Rice*, 783 F.2d 401, 406 (4th Cir.1986).

Walton echoes this basic philosophy and is the seminal case in this area. While the wording of the Arizona statute in *Walton* is not identical to that of the Kansas statute, the operation is the same. The United States Supreme Court's analysis bears repeating:

"So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 650, 110 S.Ct. 3047.

With this simple framing of the issue, it is clear that Kansas' statute passes constitutional muster. K.S.A. 21-4624(e) requires the State to prove one or more of the aggravating circumstances beyond a reasonable doubt. There is no burden on the defendant to prove mitigating circumstances; the jury may consider anything it considers a mitigating circumstance regardless of whether it has been "proven" or not. K.S.A. 21-4624(f) requires the court to review a death sentence imposed by a jury to ensure it is supported by the evidence. The fact that a death sentence results where aggravators and mitigators are found to be in equipoise does not lessen the State's burden to prove the existence of aggravating circumstances.

Kleypas fails to explain how the Kansas scheme precludes the sentencer from considering any mitigating evidence, much less how the Kansas scheme forces the jury to disregard such evidence. Clearly the Kansas scheme allows,

under K.S.A. 21-4624(e), consideration of *any* mitigating circumstances found to exist.

Justice Scalia's pointed concurring opinion in Walton concluded that guided discretion and individualized sentencing as set forth in the cases cannot be reconciled. The majority's treatment of the Arizona weighing equation, however, suggests that in an attempt to harmonize the two objectives, the Court has fashioned a safety valve of sorts. In effect, while holding in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), that the *substance* of mitigating evidence cannot be restricted beyond a determination of its relevance, the Court in subsequent cases stops short of an "anything goes" approach to the defendant's presentation of mitigating evidence by allowing the states to fashion the *procedure or method* by which mitigating evidence is considered. This is evident in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), where the Court refused to require a weighing equation, and in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), and *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), where the Court in summary fashion approved two states' formulations of a weighing equation. *Walton* is an extension of *Blystone* and *Boyde* in that the Court once again faced the task of evaluating a particular type of weighing equation, and it refused to delve into the mechanics of the equation, focusing instead on the more basic requirements of whether the sentencer was allowed to consider all relevant mitigating evidence.

The Court's development of Eighth Amendment jurisprudence on this issue suggests that the precise nature of any state's weighing equation is not at issue. The weighing equation is part of the procedural makeup of the death penalty decision, and as long as it operates within a scheme which allows full consideration of relevant mitigating

evidence, it is left to the broad discretion of the individual states.

In *Walton*, the Supreme Court did more than simply approve the particular wording of the Arizona weighing equation. It confirmed what its earlier decisions suggested – that the Eighth Amendment would be applied to the substance of the death penalty decision to ensure guided discretion and individualized consideration, but that procedural aspects, the weighing equation among them, would be left to the will of state legislatures. See *Tuilaepa v. California*, 512 U.S. 967, 980, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (reiterating that the States are not constrained to "adopt a kind of mandatory sentencing scheme requiring a jury to sentence a defendant to death if it found, for example, a certain kind or number of facts, or found more statutory aggravating factors than statutory mitigating factors"); *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998) ("Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to any relevant mitigating evidence.... But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence."); *Campbell v. Blodgett*, 978 F.2d 1502, 1512-13 (9th Cir.1992).

The substance-procedure dichotomy thus renders unimportant the distinction, as raised by Kleypas, between the approved Arizona weighing equation and the Kansas weighing equation.

The balance of Kleypas' arguments can be characterized as general complaints about the inherent unfairness of allowing a "tie," or aggravators and mitigators found to be in equal balance, to result in a sentence of death. Kleypas couches this "tie goes to the State" argument in terms of a presumption of death and a burden on him to prove that his life should be spared. The visceral appeal of this argument is simply not supported by the Eighth Amendment.

Much of this appeal likely stems from thinking of the sentencing decision in terms of the State's burden during the guilt phase of a trial. It is clear, however, that the guilt phase and sentencing phase are distinct and subject to different rules. In *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), the United States Supreme Court rejected an analogy between the two phases, noting

> "the fundamental difference between the nature of the guilt/innocence determination ... and the nature of the life/death choice at the penalty phase.... In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." 463 U.S. at 1007-08, 103 S.Ct. 3446.

If the Kansas death penalty scheme meets the Eighth Amendment requirements of guided discretion and individualized sentencing, the details of the weighing equation should not operate to defeat the balance of the death penalty law under the federal Constitution. That the Kansas weighing equation may or may not differ from that of Arizona is of little consequence; it is a matter of procedure left to the discretion of the States.

272 Kan. 894, 40 P.3d 139